Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

EARL JORDAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

A. LAVAR TAYLOR
Counsel of Record
ROBERT S. HORWITZ
Law Offices of A. Lavar Taylor
6 Hutton Centre, Suite 880
Santa Ana, CA 92707
(714) 546-0445
ltaylor@taylorlaw.com

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QUESTION PRESENTED FOR REVIEW

Whether the district court erred in entering summary judgment in favor of the United States in an action involving a Trust Fund Recovery Penalty assessed under 26 U.S.C. §6672 where evidence was presented that petitioner, at the time corporate withholding taxes went unpaid, had no discretionary authority to determine how corporate funds were to be disbursed.

PARTIES TO THE PROCEEDING

The Petitioner is Earl Jordan. The Respondent is the United States of America. No corporation is a party to this proceeding.

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Earl Jordan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum Disposition of the Ninth Circuit Court of Appeals (App., *infra,* 1a) is reported unofficially at 2009 U.S. App. LEXIS 28128, 2010-1 U.S. Tax Case. (CCH) ¶50,138. It is not officially reported. The Order and Summary Judgment of the District Court for the Central District of California (App., *infra*, 5a, 7a, 12a) are unreported.

BASIS OF JURISDICTION

The Memorandum Disposition of the Ninth Circuit Court of Appeals affirming the district court was issued on December 22, 2009. A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on February 5, 2010, and was denied on March 5, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code (26 U.S.C.) §6671(b) provides as follows:

> (b) PERSON DEFINED. – The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of

> a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Internal Revenue Code (26 U.S.C.) §6672 provides, in pertinent part, as follows:

> (a) GENERAL RULE – Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Rule 56(c)(2), Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

STATEMENT

The Internal Revenue Service ("IRS") assessed a penalty of approximately $390,000.00 against petitioner under 26 U.S.C. §6672 based on the failure of Jordan Pharmaceuticals, Inc. ("JPI") to pay over to the IRS income and social security taxes withheld from the employees of JPI for the third and fourth quarters of 1999. Petitioner filed a refund suit in district court to challenge the penalty assessment, claiming that he did not have the ability to control payment of corporate funds at the time the withheld taxes went unpaid.

In response to a motion for summary judgment filed by the government, petitioner submitted his declaration, a declaration of one of JPI's former controllers and deposition testimony of another former controller of JPI. App., *infra*, 38a, 62a. The declarations and deposition testimony indicated that petitioner did not have control over JPI's funds during the time periods when JPI's taxes went unpaid. They further indicated that control over corporate funds during the relevant time periods was held by an attorney representing JPI, who was raising funds for JPI from third party investors and whose firm was paid over $1 million while the unpaid taxes were accruing.

The District Court granted summary judgment in favor of the government. App., *infra*, 5a, 7a, 12a. Petitioner appealed to the Ninth Circuit, which affirmed the District Court. App., *infra*, 1a.

Petitioner's Petition for En Banc Rehearing was denied. App., *infra*, 36a.

1. This case involves two related issues which continue to divide the Courts of Appeals, namely, a) under what circumstances may a person avoid liability for unpaid "withheld" federal income and employment taxes under 26 U.S.C. §6672 based on their inability to direct or control the payment of corporate funds, and b) what evidence is needed by a party to defeat a motion for summary judgment brought by the government in a case where the government has asserted liability under 26 U.S.C. §6672 and where the party charged with liability is asserting that he or she lacked the ability to direct or control corporate funds.

Under section 6672, third parties can be held liable for the unpaid income and social security taxes withheld by employers from their employees ("withheld taxes") which are thereafter not remitted to the Internal Revenue Service by the employer. In order to be held liable under section 6672, a person must be a "responsible person" and must act "willfully." *See Slodov v. United States*, 436 U.S. 238 (1978).

The question of whether a person is a "responsible person" with respect to a company generally depends on whether he or she had the power within that company to ensure that federal income and employment taxes withheld by the company from wages paid to company employees were paid to the IRS at the time the withheld taxes went unpaid. *See, e.g., Purcell v. United States*, 1 F.3d 932 (9th Cir. 1993),

United States v. Jones, 33 F.3d 1137 (9th Cir. 1994), *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2000), *Greenberg v. United States*, 46 F.3d 239 (3d Cir. 1994). If the person had such power, he or she is a "responsible person." If the person lacked such power, he or she is not a "responsible person."

The term "willfully" requires nothing more than a) a person knows that the taxes owed to IRS were not paid and b) that person pays corporate funds to any party other than the IRS knowing that the IRS taxes are not paid. No evil motive or intent to permanently deprive the IRS of the tax funds is required to impose liability. *See, e.g., Buffalow v. United States*, 109 F.3d 570 (9th Cir. 1997), *Gustin v. United States*, 876 F.2d 485 (5th Cir. 1989), *Brounstein v. United States*, 979 F.2d 952 (3d Cir. 1992).

2. There are many refund suits brought under section 6672 where the person against whom the government has assessed liability asserts that he or she is not a "responsible person" because he or she lacked the actual power to control corporate funds, even though he or she 1) held the title of corporate president or chief financial officer, 2) had an ownership interest in the company and 3) had signatory authority over the company checking account. The claim of a lack of actual power to control corporate funds is often based on an assertion that there was a third party who exercised control over corporate funds to the exclusion of the person who brought suit against the IRS under section 6672. That third party might be a financial institution, another

corporate officer, or, as was the situation in the present case, an attorney who was raising funds from outside investors for use by the company.

In refund suits brought under section 6672 where the plaintiff is claiming that he or she lacked actual control over corporate funds during the relevant time period, the government will often file a summary judgment motion, which is in turn opposed by the plaintiff, who offers evidence, including declarations, in support of the plaintiff's position that the plaintiff lacked actual control over corporate funds during the relevant time period. The trial court must then decide whether the plaintiff has offered evidence that is sufficient to create a genuine issue of material fact on the question of whether plaintiff is a "responsible person" for purposes of section 6672.

A similar issue arises when, during trial and/or post-trial proceedings in a refund suit brought under section 6672, the government submits a motion asking the trial court to rule as a matter of law that the plaintiff has failed to offer sufficient evidence to show that the plaintiff was not a "responsible person." The court must then confront the issue of whether the evidence offered by the plaintiff regarding lack of control over corporate funds is legally sufficient to establish that the plaintiff was not a "responsible person."

3. The present case involves this precise issue, which arose in the context of a summary judgment

motion filed by the government. The relevant facts in the present case are as follows.

The IRS assessed Trust Fund Recovery Penalties against petitioner for the third and fourth calendar quarters of 1999 in the approximate amount of $390,000.00 because the IRS believed that petitioner was a responsible person of JPI who willfully failed to collect, account for and pay over tax withheld from employee wages during those periods. Petitioner, after exhausting his pre-assessment administrative appeals within the IRS, made partial payments toward each assessment and filed refund claims. The IRS denied the claims. Petitioner thereupon filed a refund action in the United States District Court for the Central District of California. The government counterclaimed for the unpaid balance of the assessments.[1]

Respondent filed for summary judgment based on the argument that petitioner, as a corporate officer and director, corporate shareholder and signatory on the corporate bank account, was a responsible person as a matter of law. In opposition, petitioner filed his declaration, along with a declaration and deposition testimony of two former employees of JPI, each of whom had served as corporate controller during the relevant time periods. App., *infra*, 38a, 62a. Those declarations and the deposition testimony, which were considered by the District Court in deciding the

---

[1]Petitioner was also assessed a penalty for the third quarter of 2000. The parties settled the asserted liability for this quarter while the case was pending before the District Court.

summary judgment motion, reflected in relevant part the following facts.

JPI was a pharmaceuticals company founded in 1989. The company did not manufacture the products which it sold. Petitioner was a Director and corporate President of JPI from its founding until September of 2000. Petitioner's Decl. at ¶¶1-9, App., *infra*, 38a-40a.

Until 1998, petitioner was in exclusive control of the finances of JPI. In 1998, however, JPI needed outside funds to continue its operations, because the company could no longer enter into long term contracts to purchase the products which it sold. Thus, JPI needed to acquire its own manufacturing plant to continue its operations. Which in turn meant that JPI needed money. Petitioner's Decl. at ¶¶10-19, App., *infra*, 40a-43a.

Enter attorney Andrew Pollet, whose offices were in Los Angeles, and who incorporated JPI and represented JPI. Because other efforts to raise funds had failed, Pollet, with petitioner's authorization, began raising funds by the sale of JPI stock to persons that Pollet knew. Pollet, as the person who was raising nearly all of the funds being used by the company, insisted that he control how company funds were spent. As the result of stock sales to outside investors located by Pollet, petitioner's share of the voting stock of JPI dropped from 100% to 15%. In the summer of 1999, Pollet and his investors obtained a majority position on the board of directors *Id.*

At this point in time, effective control over corporate finances shifted from petitioner to Pollet. As stated in petitioner's declaration:

> 20. Allowing Mr. Pollet to raise capital on behalf of JPI came at a price: * * *I had to give up control over corporate finances. From that time forward, Mr. Pollet controlled the finances of the corporation. He alone arranged for financing for the corporation, both through the sale of stock to his group of investors and through loans he obtained on behalf of the corporation. He determined the amounts that would be deposited in JPI's bank accounts. He required that he alone have the right to approve all major corporate decisions. He alone had the right to determine which creditors of the corporation were paid. He also required that checks drawn on JPI's account be sent to him for approval before they were issued to creditors. Because of this, no funds could be disbursed to pay creditors and the company could not incur any financial commitments without Mr. Pollet's express authorization.

Petitioner's Declaration at ¶20, App., *infra,* 43a-44a. Mr. Pollet was the embodiment of the "Golden Rule": He who has the gold rules.

Petitioner's declaration was not the only testimony presented to the District Court in opposition to the Government's summary judgment motion. Petitioner also submitted the declaration of Lisa Wutka, who worked for JPI as accounting manager from 1992 until March,1999 and then until the end of 1999 as corporate controller. Ms. Wutka stated as follows in her declaration:

> 5. * * * Because he was responsible for raising funds for JPI, through 1999, Mr. Pollet was the sole person in control of JPI's finances... .
>
> 6. As of March, 1999, all of JPI's employees, offices and facilities were in Illinois. Its bank accounts, however, were in California [where Pollet was located]. All deposits into JPI accounts after March, 1999 from funds raised by Mr. Pollet were handled by Mr. Pollet and his office. Most of the money going in to the accounts were from funds raised by Mr. Pollet.
>
> 7. Prior to November, 1999, I would prepare checks on JPI's accounts at Wells Fargo Bank to pay bills owed by JPI. Mr. Jordan or I would sign the checks. I would then send the checks, together with invoices, purchase orders, and other backup documentation to Andrew Pollet at his office in Los Angeles for approval.

I would also send the payroll checks and payroll information to Mr. Pollet's office. After Mr. Pollet reviewed the checks, his office would send the checks back.

8. If Mr. Pollet did not want a check issued, he would place a post-it note on the check with instructions. If Mr. Pollet authorized a check to be released, I would send it to the creditor to whom the money was owed. Mona Buchanan, who was Mr. Pollet's assistant, would advise me whether their office deposited sufficient funds in the accounts to cover the checks that Mr. Pollet had authorized. Once I was informed that there were sufficient funds in the accounts, I would issue the checks.... * * *

10. During the summer of 1999, I would make the payroll tax deposits with the Internal Revenue Service on behalf of JPI using the Electronic Federal Tax Payment System ("EFTPS"). * * *

13. Beginning sometime in the third quarter, 1999, Mr. Pollet would only provide sufficient funds to pay net payroll and would not authorize the payment of payroll taxes. This was the first time that I had worked for JPI where the company failed to meet its payroll tax obligation. I was told by Mr. Pollet that

since the payroll tax was already past due there was a penalty, and it did not make sense to pay the tax at that time. He further told me that JPI would only be paying vendors, suppliers, and net payroll for now, but that the payroll tax would all be paid when additional funding came in. * * *

15. In early November, 1999, JPI opened a general checking and a payroll checking account at Imperial Bank in City of Commerce, California. Mr. Pollet was the signatory on both of these accounts. At this time, Mr. Jordan told me that there would be a change of procedures. Mr. Pollet would be signing checks on the accounts at Imperial Bank. I was to send all invoices and back up documentation by Federal Express to Mr. Pollet, together with the checks for him to sign. After he reviewed and signed the checks, they would be sent back to JPI by Federal Express for me to send out. * * *

19. Among the checks signed by Mr. Pollet on the temporary checkbook [for the Imperial Bank account] were five checks made payable to himself or to his law firm. These checks are listed below: [Check No. 1002 for $300,000.00, Check No. 1003 for $522,922.19, Check No. 1027 for $400,000.00, Check No. 1028 for

> $54,694.42, and Check No. 1029 for $41,871.97[]....
>
> 20. Thus, while JPI was accruing a large payroll tax liability, Mr. Pollet was using his power as the person in control of corporate finances to pay his firm more than $1.3 million....* * *
>
> 22. Besides being the only person who could authorize and approve the issuance of JPI checks, Mr. Pollet was the only person who could authorize a wire transfer of funds from the JPI accounts at Imperial Bank. Mr. Pollet would coordinate wire transfers from these accounts with Joe Lim, an officer at the bank. * * *

Wutka Declaration at ¶¶5-22, App., *infra*, 63a-68a. The deposition testimony of Dale Rickey was also offered to show that it was Mr. Pollet who exclusively controlled how corporate funds would be disbursed.

Petitioner first learned that JPI had unpaid federal withholding taxes in November of 1999. In that same month, Pollet opened both a general checking account and a payroll account for JPI at a new bank located in California. Those accounts were JPI's only active accounts from that point until JPI ceased operations. Between November, 1999 and March, 2000 petitioner signed just one JPI check

drawn on this account. Petitioner's declaration at ¶¶ 27, 31, 37, App., *infra*, 47a-51a.

Because petitioner was opposing a summary judgment motion brought by the government, the court below, in determining whether there was a genuine material issue of fact, was required to view the evidence in the light most favorable to petitioner. All justifiable inferences were required to be drawn in favor of petitioner, the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-255 (1986).

Notwithstanding the evidence cited above, and notwithstanding the rule set forth in *Anderson v. Liberty Lobby, supra*, this evidence was deemed by the Ninth Circuit (and by the District Court) to be insufficient to preclude summary judgment against petitioner on the question of whether he was a "responsible person."

REASONS FOR GRANTING THE PETITION

A. There is Conflict Among the Circuits

The Courts of Appeals are divided on the question of what evidence is sufficient to raise a triable issue of fact in a suit brought under section 6672 where a person who is an officer, shareholder and signatory on the company bank account asserts that he or she lacked the ability to control corporate funds due to the actions of a third party. In addition, two Courts of Appeals panels that have decided these types of cases

have had dissenting opinions, and the Ninth Circuit itself is decidedly schizophrenic on this issue.

1. The Different Circuit Court Opinions

The result reached by the Ninth Circuit in the present case is directly at odds with a reported Ninth Circuit opinion, *Alsheskie v. United States*, 31 F.3d 837 (9th Cir.1994) (upholding as not clearly erroneous a finding that the corporate president and chairman of the board was not a "responsible person" where the president credibly testified that he lacked control over company funds due to a financing agreement with the company's parent company). There was a dissenting opinion in *Alsheskie*. The fact the Ninth Circuit's opinion in *Alsheskie* is inconsistent with its opinion in the present case was brought to the Ninth Circuit's attention in a petition for rehearing with a suggestion of rehearing *en banc*, which the Ninth Circuit denied. App., *infra*, 36a.

The Ninth Circuit's decision in the present case is also at odds with *United States v. Carrigan*, 31 F.3d 130 (3d Cir. 1994) (reversing the trial court's grant of summary judgment against corporate president where the president had check signatory authority, signed one check, and spent time raising capital for the company but where the president's power over finances was limited by the actions of the company's chief executive officer and chief financial officer), and is at odds with *Lewis v. United States*, 2009-2 USTC ¶50,503 (6th Cir. 2009), *cert. denied*, -- U.S. -- (2010)(reversing summary judgment against corporate

president and chief financial officer, who offered conflicting claims regarding their own authority and both of whom claimed that their authority was restricted by the board of directors), an unpublished opinion which relied on the Fourth Circuit's published opinion in *O'Connor v. United States*, 956 F.2d 48 (4th Cir. 1992), and the Sixth Circuit's published opinion in *Gephart v. United States*, 818 F.2d 469 (6th Cir. 1987). All of these cases are consistent with the Ninth Circuit's majority opinion in *Alsheskie*, but are inconsistent with the decision in the present case and inconsistent with a decision of the Tenth Circuit, discussed below.

The holding of the Third Circuit in *Carrigan* was recently relied upon by a District Court in New Jersey to deny a summary judgment motion by the IRS on the issue of whether the plaintiff was a "responsible person." *See Kilraine v. United States*, 2010 U.S. Dist. Lexis 4087, 2010-1 U.S.T.C. ¶50,196 (D.N.J. 2010), a case factually similar to the present case, in which the District Court held that it could not decide the "responsible person" issue on summary judgment but granted summary judgment against the IRS on the issue of willfulness.

The *Alsheskie* opinion was severely criticized by the Tenth Circuit in *Bradshaw v. United States*, 83 F.3d 1175 (10th Cir. 1995), *cert. denied* 519 U.S. 928 (1996)(reversing judgment in favor of corporate president and part owner of the company despite detailed factual findings that the president could not disburse corporate funds without authorization of the

bank with which the corporation had entered into a secured financing agreement). The Tenth Circuit has continued to rely on the legal standard set forth in *Bradshaw*. *See Smith v. United States*, 555 F.3d 1158 (10th Cir. 2009).

The First Circuit has also followed *Alsheskie* on the question of under what circumstances a party may avoid liability based on an asserted inability to control the disbursement of company funds, but there was a dissenting opinion. *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2000) (reversing a bench trial judgment against corporate treasurer and part-owner of company where others controlled day to day operations of the company). This issue has also been addressed by the Fourth Circuit, *O'Connor v. United States, 956 F.2d 48* (4th Cir. 1992) (reversing trial court's granting of summary judgment against taxpayer who was vice-president and 50% owner of the business on the "responsible person" issue), *cited with approval, Erwin v. United States*, 591 F.3d 313 (4th Cir. 2010), and the Federal Court of Claims. *Salzillo v. Commissioner*, 66 Fed. Cl. 23 (2005) (ruling against the government where the Court found that a company's chief financial officer lacked actual authority over corporate funds).

2. The Facts and Holdings in the Key Courts of Appeals Decisions

To better understand the Circuit conflict, and to understand how the Ninth Circuit in the present case completely abdicated its responsibility to square the result in the present case with the Ninth Circuit's own

ruling in *Alsheskie*, a review of the facts in *Alsheskie*, the facts in *Purcell* (the Ninth Circuit opinion upon which the panel in the present case relied), and the facts in *Smith* (the Tenth Circuit case that conflicts with *Alsheskie*) is appropriate.

a. The Facts and Holding in *Alsheskie* v. United States

In *Alsheskie*, the Ninth Circuit was presented with the following facts. In the fall of 1985, Pro Quality Enterprises ("PQE") defaulted on a financing contract with Commercial Financing ("Commercial"). Commercial foreclosed on the assets of PQE and, using the foreclosed assets, established Lion Manufacturing ("Lion") as a subsidiary. Alsheskie became Lion's president and chairman of the board in November 1985. He held these positions at all relevant times. His duties included (1) managing the corporation's day-to-day activities, (2) hiring and firing employees, (3) setting employees' wages, (4) signing payroll checks and checks to creditors and (5) preparing accounting records. He also prepared and signed all of Lion Manufacturing's tax returns. 31 F. 3d at 838-39.

Under its financing agreement with Commercial, Lion turned over all checks received to Commercial, which returned 20% of those funds to Lion. Alsheskie used those funds to pay employee wages. The funds were not used to pay Lion's tax obligations. It was undisputed that by February 1986, Alsheskie knew that Lion was delinquent in paying its federal employment taxes, a matter that he discussed

with Lynn Sopwith, the head of Commercial. Sopwith assured Alsheskie that he would take care of the tax problems "later." 31 F.2d at 839.

The trial court found that Mr. Alsheskie was not a "responsible person" for the tax periods at issue. The trial court concluded as follows:

> [E]ven though Alsheskie was the titular head of the Corporation, had sole signature authority over its only checking account and signed numerous checks, signed contracts, hired and fired employees and managed the day to day operations of the corporation, he did not have discretionary authority to pay the Corporation's withholding taxes during the first three quarters of 1986. Rather the control that [Commercial] maintained over the financial operations of [Lion], through its accounts receivable financing arrangement, precluded Alsheskie from paying the Corporation's tax obligations.

31 F.3d at 839. The Ninth Circuit affirmed the trial court's conclusion as "not clearly erroneous." *Id.*

The Ninth Circuit, in support of its ruling, cited to Alsheskie's declaration, in which he stated that Commercial's "control over the financial operations of Lion Manufacturing essentially precluded me from exercising the degree of autonomy, authority and control necessary to be able to pay the payroll tax

liabilities of Lion Manufacturing, Inc. . . . on a timely basis."31 F.3d at 839. It appears that Alsheskie offered no other declarations at trial other than his own in support of his position. *Id.*

b. The Facts and Holding in *Purcell v. United States*

In *Purcell,* the Ninth Circuit faced the following fact pattern. Joseph Purcell ("Purcell") was president and sole shareholder of Purcell Temporaries, Inc. From the time he founded the company in 1978 until February 1980, Purcell also served as its chief financial officer ("CFO"). At that point, however, Purcell decided to devote more of his energies to sales and promotional activities, and so hired Lester Hatchard ("Hatchard") as CFO.

This was not a good decision. Hatchard embezzled over $450,000 from the Company during his tenure, using a signature stamp bearing Purcell's signature to issue Company checks payable to himself. Eventually, Purcell learned that Hatchard had a prior criminal record; confronted with this discovery, Hatchard resigned his position in July of 1981.

After Hatchard left the Company, Purcell re-assumed control over its financial affairs. He quickly discovered that, contrary to what he had been led to believe, the Company was in terrible financial shape, with a negative net worth, and a substantial net bank overdraft. He also learned that Hatchard had failed to file federal employment tax returns for the first two

quarters of 1981 and that the withheld taxes had not been paid over to the Internal Revenue Service ("IRS"). 1 F.3d at 935.

The Ninth Circuit held that Mr. Purcell was a "responsible person" for purposes of section 6672. Purcell argued that he was not "responsible" because he was not actively involved in the day-to-day operations of the company, having delegated his duties to Hatchard. The Court rejected Purcell's delegation argument, because Purcell had the ability to control the finances of the company while Hatchard was running the company. Purcell merely chose to pursue other activities while Hatchard was running the company. Purcell was not prevented by Hatchard from controlling the finances of the company. Because Purcell could have exercised control over the finances of the company, the fact that he chose not to exercise that power was legally irrelevant.

c. The Facts and Holding in *Bradshaw v. United States*

In *Bradshaw,* Bradshaw was the president of Heritage Building Products ("HBP"). Bradshaw was also president of HBP's parent company, owned 13% of the parent company, and was on the board of directors of both corporations. In May of 1985, at a point when Bradshaw was unquestionably in control of HBP and its finances, HBP entered into an agreement with Zions First National Bank ("Zions") for a new company line of credit. The agreement with Zions gave Zions a lien on all assets of HBP and the right to freeze all

accounts at Zions in the event of a default under the agreement by HBP.

HBP failed to pay withholding taxes owed to IRS for the first three quarters of 1986. On March 15, 1986, Zions froze all funds in HBP's bank account and declared a default. Thereafter, funds belonging to HBP which were collected by Zions were deposited into a special account and could not be accessed by HBP without the permission of Zions. Thereafter, no disbursement of HBP funds could be made without express authorization from Zions. Thereafter, Zions authorized HBP funds to be used to pay net payroll of HBP and to pay other expenses of HBP, but Zions refused to allow any funds to be paid towards the payroll taxes owed to IRS relating to the net payroll which Zions had authorized to be paid.

The IRS assessed Bradshaw under section 6672 for the unpaid withholding taxes for all three quarters of 1986. Bradshaw challenged the assessment in District Court, claiming that he had no control of the funds of HBP after Zions began controlling disbursement of HBP funds. The District Court held for Bradshaw and made specific factual findings that Bradshaw had no ability to control HBP funds after Zions seized control of all HBP funds. 83 F.3d at 1180.

The Tenth Circuit reversed, holding that, notwithstanding Bradshaw's inability to control HBP funds after Zions seized control of all HBP funds in March of 1986, Bradshaw was a "responsible person"

for all three quarters of 1986. The Court reasoned as follows:

> By giving the Bank the power to exercise financial control of HBP in the event of a default, Bradshaw necessarily gave the Bank the power to decide whether or not to pay a given creditor. In this way Bradshaw effectively granted the Bank the power, in the case of HBP's default, to prefer other creditors over the government. While we agree with the district judge that when the Bank froze HBP's accounts Bradshaw lacked the power to pay the taxes absent the Bank's approval, this lack of power was the direct result of the Agreement which Bradshaw had negotiated and entered into on behalf of HBP. At the time the Agreement was executed in May 1985, it is clear that Bradshaw was a responsible person under §6672 . Bradshaw could not cease to be a responsible person simply by ceding to the Bank the right to exert financial control over HBP.

83 F.3d at 1180-1181.

3. Analysis of These Cases and the Present Case

The discussion above illustrates the following points. First, there is a clear conflict between

Alsheskie and *Bradshaw*. The Tenth Circuit held in *Bradshaw* that a person can be deemed a "responsible person" during a time period when they have no actual ability to control corporate funds just because at some earlier time, when they were in control of the company, the company voluntarily entered into an agreement with the party that allowed that party to control corporate funds during a later time period when the taxes were not paid.

The Ninth Circuit, while noting that Alsheskie signed documents for Lion in his capacity as corporate president, did not think it important to discuss whether Alsheskie had signed the documents which gave Commercial a senior lien on all assets of Lion, thereby allowing Commercial to control the finances of Lion in the time period during which Lion failed to pay its federal withholding taxes. That particular fact was deemed irrelevant by the Ninth Circuit in *Alsheskie*.

The fact that was important in *Alsheskie* was the finding by the trial court that Lion's parent and lender, Commercial, exercised exclusive control over Lion's finances during the relevant time periods. This factual finding in *Alsheskie* resulted in the Ninth Circuit ruling in favor of *Alsheskie*.

A virtually identical factual finding by the trial court in *Bradshaw* was deemed to be irrelevant by the Tenth Circuit, which ruled for the government. The Tenth Circuit's approach is inconsistent not only with *Alsheskie* but also with the approach taken by other Courts of Appeal discussed above.

The rationale used by the Tenth Circuit in *Bradshaw* is strained. Bradshaw did not voluntarily "delegate" authority to Zions when he signed the financing agreement on behalf of HBP. Rather, he entered into a commercially reasonable financing agreement that had a provision which entitled Zions to freeze all funds in the bank if there was a default under the financing agreement. Whatever authority was given to Zions under the financing agreement could not be unilaterally withdrawn by HBP or Bradshaw.

Importantly, there was no indication that the financing agreement authorized or called for Zions to advance "net payroll" to HBP, without paying the payroll taxes associated with that net payroll. Zions chose to do that on its own, by itself, independently of the financing agreement. Bradshaw's entering into the agreement with Zions is not what caused "net taxes" to be paid after Zions took control of HBP's assets. It is difficult to accept the notion that a corporate officer who enters into a typical commercial financing arrangement with a Bank on behalf of a company renders himself or herself personally liable to the IRS for all later actions of the Bank at a time when the officer no longer controls company finances, even where the Bank's actions are not contemplated in the financing arrangement.

The Tenth Circuit's approach in *Bradshaw* does support the result reached by the Ninth Circuit in the present case, because it was petitioner who authorized Pollet to raise funds from outside investors. This in

turn led to Pollet taking control of the company. Under the Tenth Circuit's rationale, since petitioner was a "responsible person" at the time he authorized Pollet to raise funds from outside investors, petitioner remained a "responsible person" during the quarters in which the taxes were not paid, even though, per the evidence discussed above, Pollet, not petitioner, controlled JPI's finances at the time the unpaid taxes accrued.

The Tenth Circuit's approach in *Bradshaw*, however, is inconsistent with the approach taken by other Circuits, including the Ninth Circuit itself in *Alsheskie*. The fact that the present case arose in and was decided by the Ninth Circuit illustrates the Ninth Circuit's schizophrenia in this area.

Second, there is no actual conflict between *Alsheskie* and *Purcell*. *Purcell* involved a situation where the person assessed by the IRS voluntarily delegated authority over the company's finances during the period in which the taxes went unpaid. The opinion in *Purcell* clearly states that there was no dispute that Purcell delegated his control over company finances and that he could have re-asserted control over company finances at any time he wanted to do so. 1 F.3d at 936.

There was no agreement between the parties in *Alsheskie* that Alsheskie had delegated control of the finances of Lion to Commerical and could have re-asserted control of Lion at any time. Rather, Alsheskie contended that he never had control of the finances of Lion during the relevant time period, and further

contended that Commercial exclusively controlled the finances of Lion during the relevant time period. The trial court so found. The Ninth Circuit affirmed that finding and held for Alsheskie. Thus, *Alsheskie* involved a situation where there was the "imposition" of control over company funds by a third party (a secured lender) who had the ability to exert such control, to the exclusion of Alsheskie.

Finally, it is apparent that there is no way to factually distinguish the facts in the present case from the facts in *Alsheskie,* even though the Ninth Circuit reached opposite results in the two cases. In both cases the person assessed presented competent, admissible evidence that he was a titular corporate officer who lacked actual authority over corporate funds because third parties were controlling the funds coming in to the corporation.

In the present case, the Ninth Circuit opinion cited to *Purcell* in holding that petitioner did not submit sufficient evidence to the Court below to create a triable issue of fact on the question of whether petitioner was a "responsible person." The Court stated that "Jordan authorized much of Pollet's financial control." App, *infra,* at 2a. The panel opinion did not discuss or analyze the evidence in the record, some of which is discussed above, that bears on the question of whether petitioner "authorized" Pollet's financial control or whether instead Pollet wrested control of the company's finances from petitioner.

The evidence offered by petitioner in response to the government's summary judgment motion, which must be accepted as face value for purposes of resolving the motion, does not support the Ninth Circuit's statement that petitioner "authorized much of Pollet's financial control." App., *infra,* 38a-69a. During the periods in which the unpaid taxes accrued, Pollet excercised exclusive control over JPI's finances. App., *infra,* 38a-69a. This evidence, even if contradicted by other evidence in the record, was sufficient to preclude summary judgment against petitioner. *Anderson v. Liberty Lobby, Inc., supra.*

The Ninth Circuit not only failed to discuss the evidence offered by petitioner in response to the government's summary judgment motion, but also failed to discuss when it was that petitioner supposedly "authorized" Pollet's financial control. Per the evidence offered by petitioner, Pollet began raising funds for JPI in 1998 and at that time began to take control of the company.

As the result of stock sales to investors brought in by Pollet, petitioner's voting stock interest in JPI dropped from 100% to 15% by the time the unpaid taxes began to accrue. Pollet also controlled the Board of Directors at that time.

By the time the unpaid taxes started to accrue, during the third and fourth quarters of 1999, Pollet was firmly in control of JPI. Pollet had exclusive control of the corporate check book and exclusive control of the funds being deposited into the corporate

checking account. Pollet approved all major contracts and purchases. From November, 1999 to April of 2000 Pollet was the only person who could issue a single signature check drawn on JPI's bank account. And, perhaps most tellingly, Pollet paid himself and his law firm well over $1 million while the unpaid taxes were accruing. App., *infra*, 50a, 67a.

Per the evidence offered by petitioner, petitioner did not "authorize" Pollet's financial control of JPI, even though it was petitioner who authorized Pollet to look for outside investors so that JPI could continue operating. Rather, Pollet wrested financial control of JPI from petitioner because Pollet was the person who was raising all investor funds, funds which were needed to keep JPI operational. The Ninth Circuit failed to even mention this evidence in its opinion or in its denial of petitioner's Petition for Rehearing.

The Ninth Circuit panel did not discuss or even mention the *Alsheskie* opinion, even though this opinion was heavily relied upon by petitioner in his briefs. Thus, the Ninth Circuit panel failed to explain why it was that Mr. Alsheskie's declaration, which stated that he lacked control over the financial affairs of the company in question (due to the control exercised by Commercial), was sufficient to sustain a factual finding that he was not a "responsible person," despite the fact that he "had sole signature authority over its only checking account and signed numerous checks, signed contracts, hired and fired employees and managed the day to day operations of the corporation," 31 F.3d at 838-39, while the declarations of Ms. Wutka

and petitioner, stating that Mr. Jordan lacked control over JPI's finances during the periods during which JPI had unpaid payroll taxes, were not sufficient to create a triable issue of fact in the present case. The fact that petitioner offered third party testimony to verify and supplement his own declaration in opposition to the government's motion renders petitioner's case stronger than Alsheskie's case.

As noted above, the differing standards used by the Courts of Appeal results in similarly situated taxpayers being treated differently. It is not appropriate for petitioner in the present case to be denied an opportunity to prove his case at trial when similarly situated taxpayers are receiving such an opportunity. *See, e.g., Lewis v. United States, supra.*

B. The Issue Presented Is Administratively Important

Litigation involving section 6672 is common, and the issue presented in the present case arises with much regularity in the federal courts. Hence the large number of opinions issued by the Courts of Appeal and trial courts involving section 6672. In addition, many thousands of administrative appeals involving section 6672 are handled by the IRS Office of Appeals each year. The Appeals Officers handling these appeals, like trial courts, rely on the decisions of appellate courts in resolving cases. Thus, the question presented in the present case is of significant administrative importance to both the IRS and to taxpayers.

For fiscal year 2009 alone, publicly available statistics indicate that the IRS assessed 445,057 "non-return related" penalties, a total which includes all trust fund recovery penalties assessed under section 6672, totaling over $5 billion. For fiscal year 2008, the total non-return related penalties assessed were 402,494 for a total of over $4.5 billion. The statistics do not tell us what portions of these totals consist solely of penalty assessments under section 6672 . Even if the assessments under section 6672 consist of only 25% of these totals, the number of assessments made each year under section 6672, and the dollar amounts involved, are quite large. These statistics for fiscal years 1995 through 2009 are available on the IRS's website, at http://www.irs.gov/taxstats/bustaxstats/article/0,,id=207459,00.html (last viewed May 26, 2010).

C. There Is Additional Administrative Importance Due to the Similarity Between the Standards for Criminal and Civil Liability

The issue presented in this petition has administrative importance above and beyond the importance discussed above, due to the fact that the legal standard currently used by courts to criminally convict taxpayers under 26 U.S.C. section 7202 for willfully failing to pay over taxes is virtually identical to the standard for imposing civil liability under section 6672. It seems strange to state that Mr. Alsheskie, if he lived in the Tenth Circuit, might have faced the prospect of criminal prosecution under section 7202. It also seems strange to state that

taxpayers in the Ninth Circuit who find themselves in a fact pattern similar to that faced by petitioner here might face the prospect of criminal prosecution if the Ninth Circuit continues to ignore its own opinion in *Alsheskie*, as it has done in petitioner's case. Yet that will be the situation if review is not granted in the present case.

Section 7202 states that any person who is required to "collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax" shall be guilty of a felony. To obtain a conviction under section 7202, the government need only prove the following: 1) the person had a duty to collect, and/or to truthfully account for, and/or pay over a tax, 2) the person failed to collect, or truthfully account for and/or pay over the tax, and 3) such failure was willful. *United States v. Easterday*, 539 F.3d 1176 (9th Cir. 2008), *cert. denied* – U.S , 130 S. Ct. 490 (2009), *United States v. Gilbert*, 266 F.3d 1180 (9th Cir. 2001), *United States v. Thayer*, 201 F.3d 214 (3d Cir. 1999), *cert. denied*, 530 U.S. 1244 (2000).

The standard for determining whether a person is under the requisite duty to collect, account for or pay over taxes for purposes of section 7202 is virtually identical to the standard for determining whether a person is under the same duty for purposes of section 6672. *See* 26 U.S.C. §7343, the language of which is identical to 26 U.S.C. §6671(b). *See also Department of Justice Criminal Tax Manual*, Section 9: Willful Failure to Collect or Pay Over Tax (2001), available at

http://www.justice.gov/tax/readingroom/2001ctm/09ctax.htm (last viewed May 26, 2010).

A perusal of Section 9 of the Department of Justice's Criminal Tax Manual makes clear that the difference between civil liability under section 6672 and criminal liability under section 7202 is little more than the exercise of prosecutorial discretion not to bring criminal charges. This section of the Criminal Tax Manual is full of references to civil cases involving section 6672, including a reference to the Ninth Circuit's opinion in *Alsheskie*.

One of the most recent cases that illustrates the lack of any meaningful difference between civil liability under section 6672 and criminal liability under section 7202 is *United States v. Easterday, supra*. In this case there was trial testimony to the effect that the defendant had used corporate funds to pay other corporate debts and, as a result, did not have sufficient funds on hand to pay the taxes withheld from the wages of the company's employees.

The Ninth Circuit held that the government need not prove that the defendant lacked the funds to pay the taxes in question in order to obtain a conviction under section 7202. Rather, the government only needed to prove that the person was aware of the duty to pay the taxes and that the person failed to do so.

The fact that the person may have hoped that using the corporate funds for other purposes would generate additional funds with which the unpaid taxes

could later be paid, or the fact that the person simply lacked sufficient funds to pay more than "net payroll, was irrelevant. It is not necessary for the government to prove an evil motive on the part of the defendant in order to prove willfulness. 539 F.3d at 1181. Thus, the willfulness standards under sections 6672 and 7202 are virtually identical.

The other cases cited above, *Gilbert v. United States, supra,* and *United States v. Thayer, supra,* are also filled with references to cases involving civil liability under section 6672. Thus, if a person meets the standards for civil liability under section 6672, that person also can be held criminally liable under section 7202.

It makes no sense that persons in the situation faced by the taxpayer in *Bradshaw* should be concerned about a possible criminal prosecution under section 7202 for failure to pay the taxes that accrued when a third party was in exclusive control of corporate funds. The notion that someone exposes themself to criminal liability under section 7202 just because they grant a financial institution the right to declare a default under a financing agreement and to seize all company funds securing the financing agreement if a default is declared, and the financial institution thereafter decides on its own to fund "net payroll" after taking control of the company's assets, is unsettling, to say the least. As noted above, the signing of such an agreement does not authorize the financial institution to exercise control over corporate funds in a manner that is inconsistent with the Internal

Revenue Code.

Similarly, allowing the attorney who represents a company to raise funds from outside investors does not constitute authorization for that attorney to exercise exclusive control over funds raised from investors in a manner that is inconsistent with the Internal Revenue Code. That is particularly so where, as is the situation in petitioner's case, the company in question had not previously failed to pay its federal withholding taxes on time. *See* the excerpts from the Wutka declaration, *supra,* at ¶¶10-14, App., *infra,* 63a-68a.

The exercise of control of company funds by a third party in a manner that is inconsistent with the Internal Revenue Code is an intervening act, not authorized by any agreement, for which the corporate officer who entered into the agreement on behalf of the company should not be held personally liable, either civilly or criminally. The position taken by the Tenth Circuit, and followed by the Ninth Circuit in its decision in the present case, if allowed to stand, will create exposure for criminal liability where none should exist.

D. The Ninth Circuit Has Failed to Uphold the Integrity of Its Own Case Law

The Ninth Circuit has fundamentally failed its duty of preserving the integrity of its own case law. The facts in the present case are similar to, and in important ways, "better" for the taxpayer than the

facts were for the taxpayer in *Alsheskie*. Yet the taxpayer in *Alsheskie* was allowed to proceed to trial and ultimately avoided liability under section 6672, while petitioner has been denied the right to present his case at trial and is faced with paying a large liability. It is not proper for the Ninth Circuit to turn a blind eye to *Alsheskie* and effectively render that opinion meaningless by issuing an unpublished opinion which refuses to even acknowledge the existence of the *Alsheskie* opinion, particularly when petitioner relied upon *Alsheskie* in his appellate briefs and when the facts in *Alsheskie* closely mirror the facts in the present case.

The Ninth Circuit's failure to preserve the integrity of its own case law is all the more remarkable given that the key Court of Appeals opinion that provides support for the Ninth Circuit's ruling in the present case is the Tenth Circuit's opinion in *Bradshaw*, an opinion that expressly disagreed with the Ninth Circuit's own opinion in *Alsheskie*.

The Ninth Circuit compounded the problem when it treated the present case as if it were a simple "delegation of authority" case like *Purcell*, acting as if petitioner could have re-exerted his authority over his company at any time he chose. Taking at face value the evidence offered by petitioner in response to the government's summary judgment motion, Pollet had exclusive control over the finances of JPI while the unpaid taxes were accruing. Petitioner, whose ownership interest had been severely diluted, had no ability to control JPI's finances at that time.

There is only one way to remedy the Ninth Circuit's failure to uphold the integrity of its own case law, namely, to grant the writ of certiorari requested by petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

A. LAVAR TAYLOR
ROBERT S. HORWITZ
Law Offices A. Lavar Taylor
6 Hutton Center, Suite 880
Santa Ana, CA 92707
714-546-0445
ltaylor@taylorlaw.com

APPENDIX A

FILED 12/22/2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL JORDAN,
Plaintiff-counter-defendant-Appellant,

v.

UNITED STATES OF AMERICA
Defendant-counter-claimant-Appellee

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted August 31, 2009[2]
Pasadena, California

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[1]This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[2]The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: GOULD and TALLMAN, Circuit Judges, and PANNER,[3] District Judge.)

Earl Jordan appeals from a summary judgment entered in favor of the United States in this action under 26 U.S.C. § 6672 seeking penalties relating to unpaid employee withholding taxes. Jordan contends he was not the "responsible person" required to pay the taxes, the assessment was invalid due to procedural errors, and some partial payments were improperly allocated. We affirm.

I.

Despite his titles of founder, President, Director, CEO, and Treasurer of Jordan Pharmaceuticals, Inc. (JPI), Jordan argues he was not the "responsible person" for purposes of § 6672. He contends he lost significant control over the company's finances after JPI entered into a financing arrangement with Andrew Pollet - an attorney, Secretary, Director, and investor with the company.

Jordan, however, authorized much of Pollet's financial control and, by his own admission, managed the day-to-day operations of the business, prepared payroll tax returns, authorized payment of federal tax deposits, signed financing contracts, and determined the company's financial policy. In light of these duties,

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[3]The Honorable Owen M. Panner, United States District Judge of the District of Oregon, sitting by designation.

and the status conferred by Jordan's titles, we conclude there is no factual dispute regarding Jordan's status as a "responsible person" under § 6672 . *See Purcell v. United States*, 1 F.3d 932, 937 (9th Cir. 1993) (holding delegation of financial affairs does not alleviate responsibility); *Davis v. United States*, 961 F.2d 867, 873 (9th Cir. 1992) (noting responsibility is a matter of status, duty, and authority).

II

Jordan argues the "jeopardy assessments" against him are invalid because they were not signed by the Chief Counsel pursuant to 26 U.S.C. § 7429(a)(1)(A). We disagree. "[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15(1926) (citations omitted); *accord Palmer v. IRS*, 116 F.3d 1309, 1311-12 (9th Cir. 1997). Jordan's bare allegation that the Chief Counsel did not approve the assessments against him does not meet his burden of proof.

We also reject Jordan's argument that he was not properly notified of the factual basis of the assessments pursuant to 26 U.S.C. § 7429(a)(1)(B). We have held that similar notice provisions are "for the protection of the only in case the IRS use[s]...summary administrative remedies....[S]uch notice is not required as a prerequisite to filing a civil action, because the filing of the action allows sufficient time for the taxpayer to consider and pay any tax that

is due before any judgment or lien can be made against his property." *Purcell*, 1 F.3d at 941(quoting *United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir. 1989)).

Jordan argues that partial tax payments by JPI should have been credited as employee withholding taxes. Without specific evidence of a valid designation, however, "the IRS may apply the payment as it sees fit." Davis, 961 F.2d at 878. Here, testimony regarding JPI's general practices and some handwritten notations are insufficient evidence to substantiate Jordan's argument or even to create a triable issue of fact.

AFFIRMED.

APPENDIX B

FILED 11/26/2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

EARL JORDAN, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	) Case No. SA CV 06-) 338-VBF(ANx)) SUMMARY JUDGMENT) IN FAVOR OF) DEFENDANT AND) COUNTERCLAIMANT) UNITED STATES OF) AMERICA AND) AGAINST PLAINTIFF
UNITED STATES OF AMERICA, Counterclaimant, vs. EARL JORDAN Counterclaim- Defendant	) AND COUNTERCLAIM) DEFENDANT EARL) JORDAN REGARDING) THE THIRD AND) FOURTH QUARTERS) OF 1999)))))

Defendant and counterclaimant United States of America's Motion For Summary Judgment or, in the Alternative Summary Adjudication of Issues, came

before the Court on August 21, 2007, the Honorable Valerie Baker Fairbank, United States District Judge, presiding. Based on the Court's Orders filed herein on August 22, 2007, granting summary judgment to defendant/counterclaimant with respect to the claims and counterclaims relating to the third and fourth quarters of 1999, and good cause appearing therefor,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiff and counterclaim defendant Earl Jordan is personally liable pursuant to 26 U.S.C. Section 6672 for the unpaid income and employment taxes withheld from the salaries and wages of the employees of Jordan Pharmaceuticals, Inc., for the third and fourth quarters of 1999, in the amount of $404,413.65, as of November 5, 2007, plus interest accruing thereafter as permitted by law.

2. Plaintiff Earl Jordan takes nothing by his complaint.

Dated: 11/21/07

/s/
Valerie Baker Fairbank
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. SA CV 06-338-VBF(ANx)

Dated: August 21, 2007

Title: Earl Jordan v. United States of America

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez	None Present
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS (IN CHAMBERS):

ORDER RE SUBMITTED MATTER: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

For the reasons set forth in its tentative order and for the additional reasons set forth herein, the Courts adopts its tentative order of August 20, 2007 as the order of Court.

At oral argument, Plaintiff stressed that the assessments were not procedurally proper. In support of this argument, Plaintiff argued that, even if his claim for refund did not allege procedural deficiency of the jeopardy assessments, he may assert procedural deficiency as a basis to challenge the government's counterclaim for the amount of the assessments. Plaintiff argues that the doctrine of variance may apply to his claim for a refund, but that the variance doctrine would not apply to the counterclaim and that he may challenge the government's counterclaim on any basis.

Counsel for the government submitted that the Plaintiffs distinction was untenable because the factual underpinning of the suit for refund and the government's counterclaim are identical. The government appears correct.

Plaintiff asserts a distinction without a difference. Section 7422(a) of the Internal Revenue Code provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty

> claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

The Treasury Regulations, 26 C.F.R. § 301.6402-2(b)(1), state:

> (b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim fo refund or credit.

The purpose of these provisions is to "prevent surprise, and to give the IRS adequate notice of the claim and its underlying facts so that it can make an administrative investigation and determination regarding the claim." *Boyd v. U.S.*, 762 F.2d at 1371 (9th Cir. 1985). The regulations are worded broadly, stating that a claim which is not presented to the IRS will not be considered for "any purpose" for a refund. Moreover, the only basis on which a refund could be provided to the Plaintiff are those which have been presented on his claim for refund. As this claim was not presented to the IRS, it cannot be presented here as a defense to the assessment.

Section 7422 would be effectively meaningless under the Plaintiff's theory, as any taxpayer could raise additional arguments in a suit for a refund under the theory that he or she could defend against the Government's likely counterclaim. The requirement of notice to the government of the taxpayer's claim would be undermined. *Boyd* pointed out that "the IRS is entitled to take the refund claim at face value and examine only the points to which it directs attention, *United States v. Garbutt Oil Co.*, 302 U.S. 528, 531-33, 58 S. Ct. 320, 322-23, 82 L.Ed. 405 (1938). If the claim on its face does not call for investigation of a question, the taxpayer may not later raise that question in a refund suit." *Boyd*, 762 F.2d at 1371-1372.

Plaintiff has directed the Court to no authority in support of his theory of variance. It would not make sense to require a taxpayer to provide the factual basis for a claim of refund but allow new claims in defense

of the counterclaim in this situation. As noted, the government should be informed of all facts supporting a refund to avoid surprise and to allow for the full administrative investigation of a claim.

/s/
Hon. Valerie Baker Fairbank

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No SA CV 06-338-VBF(ANx)

Dated: August 20, 2007

Title: Earl Jordan -v United States of America

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez None Present
Courtroom Deputy Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS (IN CHAMBERS):

TENTATIVE ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

For the reasons stated herein, the Court's tentative order is to (1) Grant Defendant's Motion for Summary

Adjudication (Partial Summary Judgment) as to the third and fourth quarters of tax liability in 1999, and (2) Deny Defendant's Motion as to the third quarter of 2000, as there is a factual dispute as to Plaintiff Earl Jordan's willfulness for this period.

1. Summary

Withholding taxes, although collected from every employees' paycheck, are paid to the government quarterly. Employers hold the collected taxes in trust for the United States until their payment, hence, these taxes are sometimes called "trust fund taxes." Under 26 U.S.C. section 6672 certain individuals may be *personally liable* for a corporation's failure to pay over to the government the taxes withheld from employee's wages. For personal liability to attach, an individual must be a "responsible person" and "willfully" fail to pay the taxes, as those terms are defined in the statute and case law.

Jordan Pharmaceuticals, Inc. ("JPI") was in the business of manufacturing generic injectable drugs. Jordan Pharmaceuticals failed to pay payroll taxes for two quarters in 1999 and one quarter in 2000. Plaintiff Earl Jordan was President, Chief Executive Officer, Treasurer, and Chairman of the Board of Jordan from the company's founding in 1989 until September 6, 2000.[1] The government seeks to recover Jordan

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[1]Earl Jordan is the Plaintiff here because he made some payments against the assessment and then filed a request for a refund of the payments, claiming that the assessment was not proper. The

Pharmaceutical's unpaid payroll taxes from Mr. Jordan personally.

Mr. Jordan's primary defense to the assessment is that Andrew Pollard, the former attorney for JPI, had taken control of the corporation's finances. Thus, as regards the unpaid taxes in 1999, Mr. Jordan claims that Mr. Pollard, and not he, is responsible. More than one person, however, may be charged as a responsible person for purposes of Section 6672 liability. Given that Mr. Jordan continued to exercise significant authority at JPI, he is properly termed a "responsible" person. In addition, Mr. Jordan's failure to pay the taxes in 1999 was willful as he permitted other creditors to be paid at the time that he was knowledgeable of an outstanding payroll tax liability to the U.S. Government. Summary adjudication of issues regarding these quarters is appropriate for the government as there is no dispute of law and there is no dispute of material fact. Ninth Circuit precedent and the facts clearly establish Mr. Jordan's liability for the assessment as to at least two quarters in which tax was not paid.

As to the third quarter in which taxes were not paid, a dispute of material fact remains. In 2000, Mr. Jordan had retained an outside firm to make sure that the taxes were paid. In addition, JPI was undergoing

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Government denied his request for a refund, and Jordan subsequently brought suit in the United States District Court, with the government counterclaiming for the balance of the assessment.

a merger because of its poor financial state and bound by a merger agreement. Neither party has introduced sufficient evidence regarding the third quarter of 2000 to permit summary judgment.

2. Legal Framework

a. 26 USC Section 6672

Section 6672 of the Internal Revenue Code states, in relevant part:

> Any person required to collect, truthfully account for, and *pay* over arty tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

In order for a person to be liable under Section 6672, two requirements must be met. ***First***, the person must be a "responsible" person. ***Second,*** the person must have "willfully" failed to pay the tax. *Aleheskie v. United States*, 31 F.3d 837, 838 (9th Cir. 1994). These terms have particular meanings in a Section 6672 case.

1. Responsible Persons

First, whether a person is "responsible" is a question of "status, duty, and authority, not knowledge." *Davis v United States*, 961 F. 2d 867, 873 (9th Cir. 1992). The Ninth Circuit has stated that a person is "responsible" where he or she has "the final word as to what bills should or should not be paid, and when." *Purcell v. United States*, 1 F.3d 932, 936 (9th Cir. 1993). "Final word" means "significant control" over the bills, and distinguishes those with higher-level control from someone such as a secretary or mere functionary. *Id.* at 937. Exclusive or total control over a company's finances is *not* required to show that a person is responsible. *See Turner v. United States*, 423 F.2d 448, 449 (9th Cir. 1970) ("final means significant, rather than exclusive, control.") As *exclusive* control is not required, more than one person within a company may be held to be a "responsible" person. *Gephart v. United States*, 818 F.2d 469, 476 (6th Cir. 1987) ("Section6672 does not confine liability for unpaid taxes only to the single officer with the greatest or the closest control or authority over corporate affairs.')

2. Willful Conduct

For purposes of Section 6672, a person willfully fails to pay taxes where a person, with knowledge of the payroll tax delinquency, permits other creditors to be paid before the United States. *Teel v. United States*, 529 F.2d 903, 905 (9th Cir. 1976). The willfulness requirement is satisfied by a "voluntary, conscious and

intentional act to prefer other creditors over the United States." *Purcell*, 1 F.3d 938. A responsible person may be said to act willfully where he pays other creditors with a "reckless disregard" of an obvious or known risk that the payroll taxes may not have been paid. *Sorenson v. United States*, 521 F.2d 325, 329 (9th Cir. 1975), *See also Buffalow v. United States*, 109 F.3d 570, 573 (9th Cir. 1997).

An intent to defraud the United States need not be proven. Even if the payments to other creditors are made with an intent to salvage the business, with a hope of permitting a larger share of the delinquent taxes to be paid, the conduct is willful and liability under Section 6672 may attach. The government is not a co-venturer in the business. *See, e.g. Buffalow*, 109 F.3d at 573.

Also of application here is *Garsky v. United States*, 600 F.2d 86 *(7th* Cir. 1979), There, the Seventh Circuit stated that a responsible person may be liable even if acting with "reckless disregard of a known risk that the trust funds may not be remitted to the Government such as by failing to correct mismanagement after being notified that the withholding taxes have not been duly remitted." *Id.*, 600 F.2d at 91. Similarly, the Seventh Circuit stressed that recklessness can satisfy the willfulness requirement: "[B]earing in mind that if a high degree of recklessness were required the purpose of the statute would be thwarted, just by compartmentalizing responsibilities within a business...we think gross negligence is enough to establish reckless disregard."

Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987). Thus, an officer may be liable where he or she knows that a corporation has recently committed such a delinquency, and, in light of continuing financial deterioration, fails to take any steps to determine the state of the tax withholding.

2. Summary Judgment Standard

The traditional standard for summary judgment applies here, *See* Federal Rule of Civil Procedure 56(c) (summary judgment appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The government, as the moving party here, has the initial burden of production. Federal Rule of Civil Procedure 56(e). A tax assessment, however, establishes a prima fade case of liability against a taxpayer. *Oliver v. United States*, 921 F.2d 916, 919-920 (9th Cir. 1990); *McKay v. United States*, 957 F.2d 689, 691 (9th Cir. 1992) ("A tax assessment is presumptively accurate. The burden of disproving the assessment is on the taxpayer."). "An assessment amounts to an IRS determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes. It is well established in the tax law that an assessment is entitled to a legal presumption of correctness - a presumption that can help the

Government prove its case against a taxpayer in court." *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 242 (2002). Thus, the government's initial burden as the moving party is satisfied by the introduction of assessment of taxes due. *Oliver v. United States*, 921 F.2d 916, 919 (9th Cir. 1990). *(See also* Govt. Exhs. 140-143). Here, the government has introduced the assessments, thus meeting its initial burden.

The burden then shifts to Jordan to show that the assessment is not proper. As the person arguing that the assessment is not correct, Jordan bears the burden of proof. *Rothstein v. United States*, 900 F.2d 543, 546 (2d Cir . 1990); *Ruth v. United States*, 823 F.2d1091, 1093 (7th Cit. 1987) (agreeing that "the taxpayer must bear the risk of nonpersuasion as to all issues presented by a section 6672 assessment case."); *Oliver*, 921F.2d at 919 ("After the government satisfies its initial burden by introducing the assessment under section 6672, the taxpayer then has the burden of proof with respect to both his own claim and the government's counterclaim.")

3. Background

Jordan Pharmaceuticals, Inc. ("JPI") was incorporated in California on June 28, 1989. Earl Jordan founded JPI, and served as President, Chief Executive Officer, and Treasurer from incorporation until September 6, 2000. Jordan was also the Chairman of the Board of Directors from July 31, 1989 until September 6, 2000.

JPI owned the rights to several lines of injectable, generic drugs. JPT had produced these through agreements with manufacturers. It did not own manufacturing facilities. Jordan submits that, around 1998, it became difficult to find manufacturing capacity. JPI was determined that it should obtain its own manufacturing facility. In order to fund this purchase, however, JPI would have to obtain capital. Jordan submits that Andrew Pollet, the long-time attorney to JPI, agreed to raise capital for the company and find investors. According to Jordan, Pollet demanded control of the company's finances in return. JPI secured financing and purchased a manufacturing facility in Illinois. This did not go well, however, and JPI quickly ran into financial difficulty, necessitating a merger. Jordan submits that in July and August 2000, JPI had no funds in its general account and JPI had no funds to make payroll in August 2000. It ceased operation. JPI entered into a merger agreement with Meridian Medical Technology in August of 2000.

JPI failed to pay withheld taxes for the third quarter of 1999 (the period ending September 30, 1999), the fourth quarter of 1999 (the period ending December 31, 1999) and the third quarter of 2000 (the period *ending* September 30, 2000). It is undisputed that Jordan became aware in November 1999 that the payroll taxes for third quarter of 1999 were not paid. It is also undisputed that Jordan became aware in February of 2000 of JPI's failure to pay fourth quarter 1999 payroll taxes.

Jordan argues that he is not responsible for payment of the 1999 taxes because another individual, Andrew Pollet, had assumed control of JPI's financial management. As to the 2000 taxes, Jordan submits that, pursuant to the Meridian merger agreement, funds were transferred by Meridian into JPI's general account. Jordan argues that funds could not be disbursed without the consent of Meridian. *(See* Jordan's Statement of Disputed Facts, ¶ 21-23). Thus, Jordan submits that he is not responsible for the payment of the third quarter taxes of 2000 because Meridian was managing JPI's finances.

In addition, Jordan argues that the non-payment of taxes was not willful with regard to the 2000 taxes. He submits that he took action to make sure that they were paid and that, in any event, he did not know that they were not paid because by the time he became aware of the deficiency, JPI was shuttered and he had resigned.

4. Analysis

For the reasons set forth below, Jordan was a responsible person. Even if Pollet was *also* responsible, Jordan's status within WI and his control over the company's finances (even if shared with Pollet) demonstrate his responsibility. In addition, Jordan acted willfully with regard to the 2000 taxes. It is undisputed that Jordan was aware of the 1999 tax liability, yet permitted payment to creditors other than the United States Government. These payments to other creditors establish that Jordan's conduct was

willful as to those quarters. Jordan does not appear to argue the issue of willfullness as to these quarters in 1999, and summary judgment is appropriate for the Defendant on those quarters of 1999 in which Jordan was responsible and willful.

Nevertheless, neither party has introduced sufficient evidence regarding whether Jordan willfully failed to make payments in the third quarter of 2000. In that quarter, the company ceased operations and was apparently bound by a merger agreement with another company. There remains a dispute of material fact regarding this quarter and thus summary judgment as to this quarter would appear premature.

1. Whether Earl Jordan Was a Responsible Person

As described above, Jordan may be held personally liable for the unpaid payroll taxes if it is established that he was a responsible person and that he wilfully failed to pay the taxes. Jordan argues that he was not a responsible person because another person, Andrew Pollet, effectively controlled JPI's finances. In addition, Jordan argues that, during the final months of his tenure with JPI, another company, Meridian, controlled JPI's finances pursuant to a merger agreement.

The statute states that a person may be liable if he or she is required "to collect, truthfully account for, and pay over any tax imposed by this title." 26 U.S.C. § 6672. Courts have interpreted this statement as

disjunctive. That is, a person need not exercise all three functions of collection, accounting, and payment. Instead, a person who performs any one of these functions may be responsible. *Mazo v. United States*, 591 F.2d 1151 (5th Cir. 1979); *Brown v. United States*, 591 F.2d 1136, 1140 (5th Cir.1979).

The determination of whether an officer is "responsible" is a matter of "status, duty and authority." *See id. See also George v. United States*, 819 F.2d 1008 (11th Cir. 1987). Among the factors that courts have looked to determine whether a person exercises sufficient authority to be "responsible" are (1) The duties of the officer under the corporate bylaws; (2) The ability of the officer to sign checks of the corporation; (3) The identity of the officers, directors and shareholders of the company; (4) The identity of the person responsible for the hiring and firing of employees; and (5) The identity ofthe person who controlled the finances of the corporation. *Gephart*, 818 F.2d 469.

1. Jordan's Status

As noted, Jordan was the President, CEO, Treasurer, and Chairman of the Board of Directors of JPI at the relevant times. Under the JPI's Bylaws, he had "general supervision, direction, and control over the corporation's business and its officers." (*See* Govt. Exh. 144, p.13).

The IRS conducted an investigation into JPI's unpaid payroll taxes. In connection with that

investigation, Jordan was interviewed. On a form 4180, signed by Jordan on May 10, 2001, Jordan admitted that, from June 28, 1989 to September 6, 2000, he had authority to hire and fire employees, to open and close corporate bank accounts, to authorize payroll checks and prepare federal payroll tax returns, to authority payment of federal tax deposits, and other duties.

Jordan replies that his status in the company is of little importance here. Refuting Jordan's argument is the case of *Purcell v. United States*, 2 F.3d 932 (9th Cir. 1993). In that case, Purcell had hired another individual, one Hatchard, to serve at CFO of his company, Hatchard embezzled approximately $450,000 from Purcell's company and failed to pay withholding taxes. It was undisputed that Purcell had handed over control of the corporation's finances to the embezzler Hatchard. Nevertheless, the Ninth Circuit approved a District Court's finding that Purcell, even as a victim of embezzlement, was personally liable for the withholding taxes.

Much like Jordan argues here, Purcell argued that he was not responsible because he had delegated responsibility over the corporation's finances. Rejecting this defense, the Ninth Circuit stated: "We note that in recent years other courts have uniformly and repeatedly rejected the delegation theory pressed upon us by Purcell." *Id.* At 937. Noting that responsibility is a matter of status, duty and authority, the Ninth Circuit continued to explain that: "Authority turns on the scope and nature of an individual's power to

determine how the corporation conducts its financial affairs; the duty to ensure that withheld employment taxes are paid over flowed from the authority that enables one to do so." *Id.*.

Here, the undisputed evidence demonstrates Jordan's authority. *See Gephart*, 818 F.2d 469,

2. Authority to Write Checks

During the relevant periods, JPI had two accounts at Wells Fargo Bank. Jordan was a signatory on the Wells Fargo accounts. (*See* Government's Statement of Undisputed Facts, ¶16, 17).

In November 1999, JPI also opened two accounts at Imperial Bank: a general account and a payroll account. The payroll account was a "zero balance" account, which contained only enough money for the payroll. Jordan argues that, after the Imperial Account was opened, the Wells Fargo Accounts were not used and that Jordan controlled the Imperial Bank Accounts.

There is a dispute as to whether Jordan was a signatory or merely a co-signor on the general Imperial Account from November 1999 until March of 2000. Jordan submits that he was only authorized to co-sign checks from the general Imperial Account from November 1999 until March of 2000. Jordan also argues that, until late February 2000, he signed only one check on the Imperial Bank general account. The Government submits that Jordan was a signatory of

this account. (*Compare* Government's Statement of Undisputed Facts, ¶ 18, 19, 20; Jordan's Statement of Disputed Facts, ¶ 20). In any event, the undisputed evidence shows that Jordan did in fact write a check on the account, In addition, it is undisputed that Jordan's signature appeared on the paychecks in this period, (*See* Jordan Decl., ¶ 38),

It is undisputed that, in March 2000, Jordan became authorized to write checks on the general Imperial Account without Mr. Pollet's co-signature.

Jordan argues that Pollet controlled the finances of the company. He argues that, in August 1998, in exchange for raising funds for JPI, he demanded financial control. Jordan argues that Mr. Pollet had primary control over the accounts at Imperial Bank, and determined the amount of money that was deposited in the bank accounts. Jordan also argues that, even if he signed checks, Mr. Pollet first approved all expenditures and refused to approve the payment of payroll taxes, Jordan argues that "Mr. Pollet controlled the deposit of funds into JPI's accounts. All checks and back-up documentation were required to be send [sic], via Federal Express, to Mr. Pollet in Los Angeles, He would then determine which checks were to be sent out." (Jordan MPA, 7:21-26).

Jordan's arguments are insufficient to raise a triable issue of fact in light of the undisputed evidence of his financial authority in the company. In addition to his titles as President, CEO, and Treasurer of JPI, Jordan indisputably exercised other indicia of

authority. Jordan *authorized* Pollet as signatory on the Imperial Account. (*See* Govt. Exh. 149). Jordan was also an authorized signatory on the general Imperial Bank account after March 2000. Jordan authorized the wire transfer of funds into the account. (*See Id.* Exh 150-151). Jordan also approved employee expense reports and signed the paychecks. (*See Id.* Exh. 155).

Even if Jordan's argument is accepted at full force, that Pallet controlled all finances of JPI with an iron fist, Jordan was still responsible. As described above, it is not necessary that Jordan have absolute control over the company's finances in order to be deemed a responsible person. All that is required is "significant" control. *See Gephart*, 818 F.2d 469. Again, the *Purcell* decision is instructive on this point. Citing to other circuits, the Ninth Circuit stated:

> Guided by our sister circuits, we conclude that an individual may be said to have "had the final word as to what bills should or should not be paid" if such individual had the authority required to exercise significant control over the corporation's financial affairs, regardless of whether he exercised such control in fact. The authority that permits control carries with it a nondelegable duty to ensure that withholding taxes are duly collected and paid over to the government.

See Purcell, 1 F.3d at 937. *See also Turner v. United States*, 423 F.2d 448 (9th Cir. 1970).

3. Hiring and Firing of Employees

It is undisputed that Jordan was also responsible for the hiring and firing of employees. For example, in December 6, 1999, Jordan hired Dale Rickey as accountingmanager. (*See* Jordan Decl., ¶ 36). Jordan had the authority to, and did sign employment agreements. (*See Govt.* Exhs, 128-131). He also approved employee bonuses and raises. (*See id.* Exhs. 132-136). Jordan retained a firm to provide financial advice and investment banking services to the company. (*See id.* Exh. 137). Jordan also terminated the relationship between JPI and Pallet's law firm.

As noted above, the ability to hire and fire employees is considered an indication that a person was "responsible" for purposes of Section 6672. *See George*, 819 F.2d at 1011. Jordan exercised this authority, specifically hiring individuals responsible for the financial administration of the company.

4. Other Indicia of Authority

In addition, Jordan was responsible for large-scale purchases. JPI purchased an ampoule line from Bausch & Strobel. Jordan signed the promissory note, security agreement, and purchase documents for the ampoule line. (See Jordan Decl., ¶ ¶ 30; Govt. Exh. 105).

Jordan argues, however, that this was done only after and with Pollet's approval. Jordan, however, signed and approved this expenditure on *November 30, 1999*. As noted above, Jordan was, at that time, aware of the unpaid tax liability. Jordan signed the promissory note and security agreement for the ampoule line on *December 14, 1999*, again, after he was aware of the unpaid tax liability. (Govt. Exhs. 106 & 107).

5. Disputed Issue of Stock Ownership

Jordan disputed the government's characterization of his stock ownership as misleading. Jordan appears correct. Jordan brings forth evidence that while he was the majority stockholder for much of the corporation's life, that share declined in the relevant years. As set forth in Jordan's statement of disputed facts, it became necessaryto raise capital for the company to purchase a manufacturing facility. To do so, the issuance of preferred stock was authorized. With the sales of preferred stock to investors, Jordan's interest in the company declined from that of majority shareholder to approximately 15%. The government does not dispute this characterization.

This dispute is one, at most, of characterization. The government does not dispute the facts regarding stock ownership put forth by Jordan. The government has established that Jordan was a responsible person and a substantial stockholder.

6. Responsibility of Pollet

Jordan's primary defense is that Andrew Pollet was the primarily responsible party. As noted above, it is undisputed that more than one person may be "responsible" for purposes of 26 U.S.C. section 6672. *See, e.g. Gephart, 818* F.2d at 476.

In addition, Pollet's control does not relieve Jordan, in his role as President, CEO and Treasurer of the company, from his duty to guarantee that trust fund taxes are paid. For example, *in Thibodeau v. United States,* 828 F.2d 1499 (11th Cir.1987), a corporate president argued that he was not responsible because he reported to the owner of the company and served at his will. The Eleventh Circuit noted that two cases had already held that "an otherwise responsible person cannot be relieved of this obligation when directed by another person not to pay the taxes..." *Id.*, 828 P.2d at 1540. As the president of the company, Thibodeau ran the day-to-day operations of the company and wrote some small checks without the approval of the owner of the company. As Thibodeau had the status, duty and authority to pay, he was required to do so, even if the company's owner did not approve and on pain of termination.

7. Dudley and *Aleshkie* Do Not Require a Contrary Finding Regarding Jordan's Responsibility

Jordan relies on two cases: *Dudley v. United States,* 428 F.2d 1196 (9th Cir. 1970) and *Aleshkie v. United States,* 31 F.3d 837 (9th Cir. 1994). Both of

these cases are distinguishable.

Dudley is plainly inapposite. There, a corporation's president believed that payroll taxes had been paid because the check for the taxes *had been sent to the government*. Inexplicably, the government delayed in presenting the check for payment and it was dishonored for insufficient funds. The president there was, perhaps, negligent, but the requisite intent was found lacking.

In *Aleshkie,* the corporation's president, although appearing to have authority, was found *not* to be responsible. *Aleshkie* was hinged on the finding that he acted only as an employee and not an owner in a critical period characterized by a corporate merger. Moreover, the circuit found only that the district court's finding was not *clear error.*

2. Whether Earl Jordan's Conduct Was "Willful" for Purposes of Section 6672

As set forth above, Jordan was clearly responsible. Thus, the second question is whether he was also willful. Willfulness is clearly established, and not seriously contested, by Jordan with regards to the periods of tax delinquency in 1999. Regarding the 2000 taxes, however, summary judgment cannot be granted.

1. Meaning of Willful Under Section 6672

Once a person has knowledge that payroll taxes have not been paid, he or she is under a duty to see that the taxes are paid before all other creditors. *Mazo v. United States,* 591 F.2d 1151, 1157 (5th Cir. 1979). Although it may sound harsh, it is even impermissible to pay employees once a person knows that the payroll taxes have not been paid. *Sorenson v. United States,* 521 F.2d *325,* 328 (9th Or. 1975); *Davis v. Untied States,* 961 F.2d 867 (9th Cir. 1992) (Willfulness is the "voluntary, conscious and intentional act to prefer other creditors over the United States"); *Klotz v. United States,* 602 F.2d 920, 923 (9th Cir. 1979).

The question of willfulness is one of fact. *Dudley v. United States,* 428 F.2d 1196, 1200 (9th Cir. 1970) As noted, willfulness may be established by the payment of other creditors after a responsible person has knowledge of a trust hind tax liability. Thus, willfulness may be appropriate for summary judgment. *See Thibodeau,* 828 F.2d at 1505(While willfulness inquiry often directed at a person's state of mind, it does not present a jury question in all cases).

2. Jordan Acted Willfully with Respect to the 1999 Taxes

Jordan admitted that he became aware of the delinquent taxes for the third and fourth quarters of 1999 in November 1999 and February 2000, respectively. (*See* Government's Statement of Undisputed Pacts, ¶ 9,12). Jordan also admitted to attending meetings from February through the end of

September 2000 regarding the unpaid payroll taxes. Other creditors were paid, however, in an apparent attempt to keep JPI running.

Jordan does not dispute the issue of willfulness as to the 1999 tax deficiencies. The evidence presented is more than sufficient for summary judgment on the issue of willfulness. As explained in *Barnett v. United States*, 594 F.2d 219, 222 (9th Or. 1979) and *Teel*, 529 F.2d 903, evidence that a responsible person, with knowledge of a payroll tax delinquency, pays other creditors, is sufficient for summary judgment on the issue of willfulness. After he had knowledge that the taxes were unpaid, Jordan could not disregard this fact any pay other creditors.

3. Jordan's Defense

Jordan focuses his willfulness arguments on the third quarter of 2000. Jordan resigned in September of 2000, Jordan submits that the company's third quarter 2000 tax return was submitted in April 2001. This was after the company had ceased operations and had no funds to pay. The return also showed that no taxes were due and Mr. Jordan believed that the taxes had been paid.

The Government submits that Jordan is responsible under the "reckless disregard" standard, described above. The Government argues: "If he did not know about the delinquency [in the third quarter of 2000], it was the result of reckless disregard of the facts. Where a taxpayer knows of past payroll tax

problems and he could have very easily found out current payroll tax problems but fails to do so, his conduct is reckless and constitutes willfullness." (Govt. Reply, 11:1-8; *citing Phillips v. United States*, 73 F.3d 939, 942-44 (9th Cir. 1996); *Wright v. United States*, 809 F.2d 425, 427(7th Cir. 1987)).

While the government is correct that Jordan had a duty to investigate and correct mismanagement, *Sorenson v. United States*, 521 F.3d 325, 329 (9th Cir. 1975), Jordan argues that the company had *no funds* from July 2000 onwards and that the only source of funding was Meridian. Moreover, Jordan states that he had retained ADP, a payroll tax service, in 2000 for the purposes of guaranteeing that the taxes were paid. While a failure to segregate the funds in a hope that sufficient money will later be available to pay the government is unreasonable and willful conduct, *Thibodeau*, 828 F.2d 1506, it is unclear if there were any funds available to segregate for the purpose of paying payroll.

Thus, summary judgment appears inappropriate for the third quarter of 2000.

5. Misapplication of Taxes Paid

Jordan argues that the assessment should be reduced because payments made to the Government were misapplied to other tax liabilities, where they should and/or could have been applied to JPI's payroll tax liability.

This argument is of little weight. Courts have repeatedly held that the IRS may apply taxes where it sees fit to a corporation's outstanding tax bill, in the absence of some indication by the taxpayer that the payment is to be applied to a specific category of tax. *Davis*, 961 F.2d at 878; *Buffalow*, 109 F.3d at 574.

6. Whether the Assessment Was Procedurally Proper

Jordan also argues that the assessment was not procured through the proper procedures regarding "jeopardy assessments." Specifically, he argues that proper notice of jeopardy and written notice were not given to him and that Chief IRS Counsel did not sign the assessment.

The government sets forth a conclusive rebuttal of this in its papers. As set forth, this argument is barred by the doctrine of variance. That is, a taxpayer may challenge an assessment only on the grounds submitted in his or her claim for refund. Jordan's claim for refund of the payments made toward the payroll tax assessment did *not* set forth this argument. Thus, Jordan may not now pursue it in this Court. *Boyd v. United States*, 762 F.2d 1369, 1372 (9th Cir. 1985); *Martinez v. United States*, 595 F.2d 1147, 1148 (9th Cir. 1979); *Bear Valley Mut. Water Co. v. Riddel*, 493 F.2d 948, 951 (9th Cir. 1974).

APPENDIX E

FILED MARCH 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL JORDAN,
Plaintiff-counter-defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-counter-claimant-Appellee.

NO. 08-55080
D.C. No CV-06-00338-VBF
Central District of California
Santa Ana

ORDER

Before: GOULD and TALLMAN, Circuit Judges, and PANNER, District Judge.*

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has

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*The Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX F

FILED AUGUST 6, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JORDAN, Plaintiff	) Case No. SA CV 06-338) VBF(ANx))
v	) DECLARATION OF) EARL JORDAN IN
UNITED STATES OF AMERICA, Defendant,	) OPPOSITION TO) DEFENDANT'S) MOTION FOR) SUMMARY) JUDGMENT

I, Earl Jordan, declare and state as follows:

1. I am the plaintiff in this action. I reside in Aliso Viejo, California. I am submitting this declaration in opposition to the motion for summary judgment that has been filed by the Defendant, United States.

2. The facts set out in this declaration are based on my personal knowledge. I could and would be able to testify to them if called upon to do so.

3. I am a high school graduate and am self taught in the field of pharmaceuticals. In 1984,

Congress passed the Drug Price Competition and Patent Term Restoration Act, which is also known as the "Hatch-Waxman Act." The Act allowed for the use of abbreviated new drug applications (called "ANDAs") to be used to obtain the rights to generic drugs.

4. Following passage of the Hatch-Waxman Act, I developed and obtained all of the rights to five generic injectable drugs. These drugs were all used in spinal and epidural anesthesia trays. A generic injectable drug is a prescription drug that is administered to a patient by injection. JPI also sold Sterile Water for Injection, USP drugs to Baxter Healthcare International for use in reconstituting drugs to control bleeding in hemophiliacs.

5. Andrew Pollet was an attorney who practiced in Southern California. His offices were located in Los Angeles. He and his firm provided legal services to me from the mid 1980's until August 2000. He and his firm also provided legal services to JPI from the time of its formation until August 2000. Prior to the spring of 2000, Mr. Pollet practiced through a law firm called "Pollet Law." At that time, he began practicing through a partnership called "Pollet & Richardson." Mr. Pollet died in 2001.

6. Initially, I marketed the 5 drugs that I held rights to as a sole proprietor. Sometime in late 1988 or early 1989, I began discussions with Mr. Pollet about the form in which to operate the business. Mr. Pollet advised that the business be operated as a corporation. Based on his advice, I requested that he form a

corporation. Mr. Pollet's law firm prepared the incorporation documents for Jordan Pharmaceuticals, Inc. (JPI), which was incorporated in California on June 28, 1989. The incorporation documents list Mr. Pollet as the "incorporator."

7. Immediately after the business was incorporated, the stock of JPI was owned 60% by me and my wife and 40% by Gary Brooks and his wife. Sometime prior to 1998, I acquired most of the JPI stock owned by Mr. Brooks and his wife. Thus, by 1998, I owned substantially all of the stock of JPI.

8. From June 28, 1989, through September 6, 2000, I held the titles of President, Chairman of the board of directors, Chief Executive Officer, and Treasurer of JPI. As discussed below, I did not always have the power and authority over corporate affairs that I associate with these titles.

9. From the time of its incorporation, through August, 1998, all major decisions of JPI were made by the Board of Directors. When Gary Brooks owned 40% of the stock of JPI, he had substantial say in JPI's affairs. Also, officers and managerial employees of JPI had authority to act on behalf of the company. However, because I was the majority shareholder of JPI during this time period, I had ultimate control over and responsibility for the company.

10. When it was formed, and through the fall of 1998, JPI did not have any manufacturing facilities of its own. JPI had to contract with companies that

operated plants that were validated by the Federal Drug Administration ("FDA") to manufacture the specific types of injectable drugs and the sterile injectable water that it sold.

11. Validation is the process by which the FDA ensures that a drug manufacturing plant produces drugs in a safe, sterile manner and that the drugs are consistent with all quality and design criteria. For an injectable drug, each manufacturing line at a plant has to be validated for a specific drug. Because of the validation process, it can take two years or more, after installation of equipment, to obtain validation for a new injectable pharmaceutical plant.

12. Through the mid 1990's JPI was able to enter into long-term contracts with established drug manufacturing companies to produce the products that it sold. Due, however, to a combination of the growth in the generic drug market and the lack of new pharmaceutical manufacturing plants coming on line in the United States, by the mid 1990's it became increasingly difficult for JPI to obtain long-term contracts. It thus became apparent that, for JPI to survive, it would have to either merge with an existing drug manufacturer or acquire its own manufacturing facility.

13. JPI therefore began merger discussions with several publicly traded pharmaceutical companies. Mr. Pollet and I handled the negotiations on behalf of JPI. None of the discussed mergers occurred.

14. In 1997, Solopak Pharmaceuticals, Inc., filed for bankruptcy in the U.S. Bankruptcy Court in Miami, Florida. Solopak was a Florida-based pharmaceutical company with an injectable drug manufacturing facility in Elk Grove Village, Illinois, which was validated to manufacture 28 different injectable generic drugs. Elk Grove Village is a suburb of Chicago.

15. In the spring of 1998, JPI began discussions concerning the acquisition of Solopak's Elk Grove Village plant (together with the rights to the 28 generic drugs that had been produced there) with LaSalle National Bank and the bankruptcy trustee for Solopak. LaSalle National Bank held a security interest against the plant. Mr. Pollet and I represented JPI in these discussions. Mr. Pollet also advised JPI concerning the acquisition of the plant.

16. JPI obtained a financial commitment from Aberlyn Capital for up to $10 million in funds to acquire the plant. Based on this commitment, JPI anticipated that it would be able to acquire the plant and the generic drug rights and begin production by June or July, 1999.

17. By July, 1998, Aberlyn Capital had failed to fund any of its commitments. During my discussions with Mr. Pollet during this timeframe, he proposed that he raise the needed capital for JPI by having the company issue a new series of stock, preferred series A stock. The JPI board and shareholders approved to this proposal in early

August, 1998. Mr. Pollet and his firm drafted the necessary documents for the issuance of preferred series A stock by JPI. A copy of JPI's Written Consent to Action of the Board of Directors and Stockholders is attached as Exhibit 12. The Certificate of Amendment of Articles of Incorporation are attached as Exhibit 13. The number of authorized shares of series A preferred stock was subsequently increased, as reflected in the May, 1999, Certificate of Articles of Incorporation, which is attached as Exhibit 14.

18. On September 1, 1998, the JPI shareholders elected Mr. Pollet, Mr. Brooks and me as directors. A copy of the Minutes of Annual Meeting is attached as Exhibit 15. In the summer of 1999, Mr. Brooks was replaced as a director by Voker Anhauser, a German citizen who was a member of Mr. Pollet's investor group.

19. After amendment of the articles of incorporation to provide for the issuance of Series A preferred stock, Mr. Pollet began raising capital through the sale of the stock to persons he knew. The shares were to be sold for $5 each. Through his efforts, Mr. Pollet, on behalf of JPI, was able to raise sufficient capital to close the acquisition of the Elk Grove Village facility from the Solopak bankruptcy estate by September, 1998. Between 1998 and 2000, through stock sales to investors and loans he arranged, Mr. Pollet raised $8 to $9 million for JPI.

20. Allowing Mr. Pollet to raise capital on behalf of JPI came at a price: while I remained

chairman, president, chief executive officer and treasurer of the corporation, I had to give up control over corporate finances. From that time forward, Mr. Pollet controlled the finances of the corporation. He alone arranged for financing for the corporation, both through the sale of stock to his group of investors and through loans he obtained on behalf of the corporation. He determined the amounts that would be deposited in JPI's bank accounts. He required that he alone have the right to approve all major corporate decisions. He alone had the right to determine which creditors of the corporation were paid. He also required that checks drawn on JPI's account be sent to him for approval before they were issued to creditors. Because of this, no funds could be disbursed to pay creditors and the company could not incur any financial commitments without Mr. Pollet's express authorization. While I retained my corporate titles, as far as corporate finances and policy were concerned, my titles were on paper only. Mr. Pollet insisted on these powers as a condition of raising the funds needed for the corporation. Since he had been the long-time attorney for me and JPI, I had no reason to distrust him. His control over corporate finances continued until the summer of 2000, as I will discuss below.

21. Prior to the sale of the series A preferred stock, I held substantially all of the stock of JPI. After issuance of the preferred stock, my share of JPI stock was diluted to approximately 15%. As the representative of his group of investors, Mr. Pollet effectively controlled the majority interest in the corporation.

22. In approximately September, 1998, Mr. Pollet and I attended a hearing in the Solopak bankruptcy case to approve the sale of the Elk Grove Village plant to JPI. At the hearing, a creditors attorney requested a good faith deposit of $100,000 to show that JPI could do the deal. In response, Mr. Pollet informed the court that he was writing a personal check for $100,000 as part of the payment for the facility. He did so and the court approved the sale. JPI purchased the facility, subject to a mortgage in favor of LaSalle National Bank.

23. Prior to JPI acquiring the Elk Grove Village facility, Mr. Pollet and I had met with representatives of the Chicago regional office of the FDA. They informed us that their office would not object to JPI's acquisition of the rights to Solopak's 28 injectable drugs and to "grandfather in" the plant for those drugs. This would have meant that the plant could be validated using the standards in effect when it was built. Had this occurred, JPI could have had the plant validated to produce those drugs within a few months after the purchase. It could then have begun to manufacture and sell those drugs. Subsequent to the acquisition, however, FDA's national office determined that, due to problems experienced with Solopak, JPI could not use the rights to manufacture those 28 drugs or have the plant "grandfathered in." As a result, JPI could not use the existing equipment as it was previously validated. Instead, it had to revalidate the entire plant to the then existing standards of the FDA, and had to install new equipment and go through the

same validation procedure needed to validate a new plant.

24. The validation process required the plant to be online and to be able to manufacture drugs in trial runs to demonstrate its ability to consistently manufacture the drugs within acceptable parameters. This meant that JPI had to begin hiring personnel after the acquisition, even though it could take up to two years after hiring before the plant was validated and could sell product.

25. By the fall of 1998, JPI began hiring qualified executives. These included John Lopez, who was hired as vice president of sales and marketing, Jeanne Moldenhauer, Ph.D., who was hired as vice president of regulatory affairs and pharmaceutical services, and Donald Harringan, who was hired as vice president of scientific affairs. A September 15, 1998, Written Consent to Action approving retaining Mr. Lopez, Mr. Harringan and me is attached as Exhibit 16. Mr. Lopez, Mr. Harringan and Dr. Moldenhauer were highly regarded in the field. I recommended their employment, but the ultimate decision on hiring them was Mr. Pollet's. Mr. Pollet's firm was to draft employment agreements for each of these individuals. It did not do so until late 1999. In recognition of the fact that these individuals had been working for JPI, the employment agreements recited that "the Executive has been rendering services to the Company." The agreements are Exhibits 128, 129 and 130 to the Defendant's summary judgment motion.

26. In 1999 and 2000, JPI maintained a general and a payroll checking account at Wells Fargo Bank in California. Lisa Wutka and I were signatories on the account. Ms. Wutka was JPI's accounting manager until March, 1999, when she became its controller. She retained that position until she left JPI in December, 1999. As controller, Ms. Wutka was in constant communication with Mr. Pollet and his office concerning the corporate finances, payment of creditors, and banking.

27. In early November, 1999, at the direction of Mr. Pollet, JPI opened a general checking and a payroll checking account at Imperial Bank in City of Commerce, California. The bank was selected by Mr. Pollet, who had a relationship with Imperial Bank. From that point until JPI ceased operation in September, 2000, the Imperial Bank accounts were JPI's only active accounts, even though the Wells Fargo accounts remained open. The funds deposited into the Imperial Bank account were from loans obtained by Mr. Pollet and funds he raised from investors.

28. Since the FDA National Office refused to approve JPI's manufacture of the 28 drugs whose rights it had acquired from Solopak, during the first part of 1999, JPI was involved in revalidating the Solopak manufacturing equipment, installing new sterile water manufacturing equipment, repairing pipes, wiring and cleaning the plant. This process was completed by August, 1999.

29. As this cleanup process was being completed, it was clear that JPI would need additional capital to acquire the equipment to manufacture the 5 injectable generic drugs it had the rights to and to hire a full complement of scientific, technical, and manufacturing personnel needed to operate the plant during and after the validation process. I discussed this with Mr. Pollet, who stated that he would arrange for loans and raise additional capital from investors. He raised these funds, including obtaining a loan from Imperial Bank. These funds allowed JPI to purchase equipment, hire additional personnel and begin the process of getting the plant validated.

30. Among the equipment JPI purchased were ampule lines from Bausch & Strocbel. Based on my discussions with JPI's technical and scientific staff, and my own knowledge of the industry, it was determined that Bausch & Strocbel equipment best suited JPI's needs. I therefore recommended to Mr. Pollet that JPI purchase the equipment. He authorized the purchase, set the parameters for JPI to acquire the equipment, and approved the terms. Defendant submitted as Exhibit 105 to its summary judgment motion a letter I signed on JPI letterhead to Bausch & Strocbel concerning financing of the ampule lines. The text of this letter was prepared by Mr. Pollet. I had it typed on JPI letterhead and signed it as president. Similarly, I signed the promissory note, security agreement and purchase documents as president of JPI only after those documents had been approved by Mr. Pollet and he had authorized me to sign them.

31. In approximately November, 1999, I was informed by Lisa Wutka that JPI had not paid all of its employment taxes for the third quarter of 1999. She did not inform me of the amount that was unpaid. I spoke to Mr. Pollet about this, since this was the first time in its history that JPI had fallen behind in paying employment taxes. Mr. Pollet said that it was no major problem, that the penalties had already accrued, and that they would be paid when more funds came in. Since I did not have independent authority to have the taxes paid, I acquiesced, believing what he said.

32. At the same time that the taxes were going unpaid, Mr. Pollet was raising issues about what he considered "unnecessary" items. These included cell phones for key managerial personnel, many of whom needed to be on 24 hour call, JPI's having an "800" phone number, and the provision of health care and 401(k) plans for employees. I put my views in a letter to Mr. Pollet dated December 20, 1999. A copy of this letter was submitted by the Defendant as Exhibit 108 in support of its summary judgment motion. At the time I wrote this letter, I believed that Mr. Pollet had gotten the taxes for the third quarter full paid and that the fourth quarter taxes were current.

33. On pages 3 and 4 of the December 20 letter, I noted that the company could need checks for C.O.D. I suggested to Mr. Pollet that "since we are already grappling for resources to move paperwork across the country each day, that a small account be set up so that Bob Dorsey, or Jeanne Moldenhauer, or myself can write checks for C.O.D. or emergency supplies."

The paperwork referred to in the letter were the checks and documentation for bills that Mr. Pollet required that JPI send to him by Federal Express. Mr. Pollet never acted on this suggestion. A "petty cash" checking account was never set up because Mr. Pollet wanted JPI to be a "one man show" that he controlled.

34. The letter also discusses the Pollet firm's billings to JPI. I found it frustrating that, while Mr. Pollet complained about ordinary and necessary business expenses costing only a few hundred dollars a month, he paid his law firm approximately $2 million dollars out of JPI's funds for legal fees between September, 1998, and March, 2000. Attached as Exhibits 17 through 21 are true and correct copies of the billing statements of the Pollet law firm to JPI dated November 30, 1999, through March 31, 2000. Attached as Exhibit 22 is a schedule showing JPI's payments to the Pollet law firm.

35. In addition to paying his law firms billings, Mr. Pollet also wrote and signed on JPI's general account at Imperial Bank two checks totaling more than $800,000 payable to himself when he had the temporary checkbook for JPI's Imperial Bank general account.

36. Lisa Wutka left JPI's employment in December, 1999. Prior to her leaving, JPI employed Dale Rickey as controller to replace her. He began working part time at JPI shortly before Ms. Wutka left. I recommended that he be employed and Mr.

Pollet agreed to the terms of his employment. Mr. Rickey reported to me.

37. After Mr. Rickey's employment, the procedure for authorizing and issuing checks remained basically the same as it was while Ms. Wutka was controller. No payment could be made without Mr. Pollet's express approval. Back up documentation for any payment had to be provided to Mr. Pollet, by federal express. And, until early March, 2000, Mr. Pollet was the only person who could sign checks on JPI's general account without a co-signature. He alone had the temporary checkbook for that account and signed all the checks. Beginning with the first printed check on that account, no. 5006, through no. 5556, he alone signed the checks, with one exception. That was a check in the amount of $43,000 to Vechtech, which I signed on the specific instructions and authorization of Mr. Pollet. Vechtech was an outside contractor hired to oversee the validation process. It threatened to terminate its work for JPI unless the payment was made "on the spot." There was no time to send the check to Mr. Pollet to sign. Since I could not sign the check without Mr. Pollet, he and I had a conference call with Joe Lim, an officer of Imperial Bank. Mr. Pollet told Mr. Lim that the bank should accept the check with my signature.

38. I became authorized to sign checks on the general account alone after Mr. Pollet was hospitalized for cancer in late February, 2000. Even though I was an authorized signatory, after that date, until August, 2000, Mr. Pollet still had to approve all payments by

JPI. Since he controlled the funds going into JPI's accounts, no payment could be made without his consent.

39. After Mr. Rickey became controller, he recommended that JPI hire ADP to do its payroll, including tax deposits and return preparation. I recommended to Mr. Pollet that this be done. At first Mr. Pollet refused. In approximately February, 2000, I learned from Mr. Rickey that JPI had not made any tax deposits during the fourth quarter of 1999. I was irate and telephoned Mr. Pollet and expressed my opinion that the company should not continue if it did not meet its payroll tax obligations. Mr. Pollet agreed.

40. Under the terms of its contract, ADP was to compute JPI's payroll and payroll tax, prepare the payroll checks and have the tax deposits paid. ADP used a facsimile of my signature to sign paychecks it issued. It would only issue checks after Imperial Bank confirmed that there were sufficient funds in JPI's payroll account. It also prepared payroll tax returns. When ADP terminated its contract with JPI in August, 2000, it was because JPI did not have enough money in its account to fund payroll.

41. Mr. Pollet and I had discussions about paying the past due payroll taxes. I urged him to make funds available to pay the taxes. Exhibit 155 to Defendant's summary judgment motion is an email exchange between Dale Rickey and me concerning the past due taxes. In that email, I told Mr. Rickey to offer to pay the IRS $100,000. Since I had no control over

funds coming into the company, I could not authorize payments of past due taxes without Mr. Pollet's authorization. I sent this email to Mr. Rickey only after Mr. Pollet authorized me to do so. JPI's cash flow consisted of loans and investor funds raised by Mr. Pollet. The reference to "cash flow" in the email is to the amount Mr. Pollet said he could make available on a monthly basis to pay the IRS. To my knowledge, the IRS never responded to this offer.

42. In spring, 2000, JPI began merger discussions with Meridian Medical Technology and with Senetek. Both Meridian and Senetek were publicly traded companies in the pharmaceutical industry. Mr. Pollet handled most of the negotiations. He also negotiated for JPI to retain First Albany Corporation to assist in the merger discussions. At Mr. Pollet's direction, I signed the letter agreement with First Albany that is Exhibit 137 to Defendant's summary judgment motion.

43. While negotiations with Meridian and Senetek were ongoing, JPI was involved in litigation with Hanna Auon. Mr. Auon was a Lebanese businessman and a major shareholder of JPI. JPI had retained Savis, an engineering firm, to assist in the validation process. Mr. Auon had guaranteed payment to Savis by JPI. In exchange, JPI was to issue additional stock to him. Before Savis began performance, Mr. Pollet caused the agreement to be terminated. This led to a lawsuit between Mr. Auon and JPI in Cook County, Illinois, state court.

44. Mr. Auon's lawsuit went to arbitration. In July, 2000, the arbitrator awarded Mr. Auon stock, which made him the major shareholder in JPI. As the major shareholder, Mr. Auon directed that, since Mr. Pollet's firm had a conflict of interest, it should no longer represent JPI. Exhibit 146 to the Defendant's summary judgement motion is a copy of a letter to Pollet & Richardson terminating their representation of JPI due to a conflict of interest.

45. After Mr. Auon was awarded the stock and Pollet & Richardson were terminated as JPI's attorneys, Mr. Pollet ceased raising funds for JPI. Thus, no additional monies were deposited into JPI's accounts from late July until mid August, 2000. At this time, Mr. Pollet and one of his investors, Voker Anhauser, were two of the three board members of JPI. By letter dated August 10, 2000, Mr. Pollet advised that a board meeting had occurred at which a term sheet offerred by Meridian was approved and that all stock issued to Mr. Auon were rescinded. A copy of the August 10 letter is attached as Exhibit 23.

46. By letter dated August 14, 2000, Mr. Auon's attorneys disputed the contention that his stock was rescinded. A copy of the August 14 letter is attached as Exhibit 24. The following day, Mr. Pollet resigned as a board member.

47. On August 15, 2000, JPI entered into a management agreement with Meridian, which still intended to acquire JPI. A copy of the agreement is

attached as Exhibit 25. The management agreement put Meridian in control of JPI.

48. After execution of the agreement, Meridian wire transferred $555,000 into JPI's general account at Imperial Bank. Meridian had its chief financial officer, Dennis O'Brien, on site at JPI. Among other things, Meridian required that Mr. O'Brien approve any expenditure of the funds it had wired to JPI. He therefore was required to cosign any transfers out of JPI's Imperial Bank account. A copy of a fax from Mr. Rickey to Imperial Bank with wire instructions Mr. O'Brien signed as representative of Meridian are attached as Exhibit 26.

49. Due to the fact that JPI had not paid its employees for several weeks and did not have the funds with which to do so, I informed the employees by letters dated August 25 that they were being laid off. A copy of one of these letters is Exhibit 145 to the Defendant's summary judgment motion. Because it could not find additional funding or a merger partner, JPI never resumed operation.

50. On September 6, 2000, a shareholders meeting was held at which Joseph Daou, Mr. Khouri and I were elected to the JPI board. Mr. Daou and Mr. Khouri were representatives of Mr. Auon. On that same day, I resigned as president of JPI and Mr. Daou became president. All disbursements of funds from JPI's accounts from that date were at the direction of Mr. Daou and Mr. Auon. Since I was a signatory on

the Wells Fargo account, checks I signed after that date were at their direction.

51. On behalf of the JPI board of directors, I retained Dale Rickey and several other former JPI administrative employees to work part time on a contract basis to close the books of JPI and to prepare final tax returns. Attached as Exhibit 27 is a true and correct copy of the JPI employment tax return for the third quarter of 2000, which Mr. Rickey prepared and I signed. It shows a zero balance due.

52. At the time I signed the employment tax return for the third quarter of 2000, to my knowledge, all withholding tax for that period had been paid. It was not until afterwards that I learned that this was not have been the case.

53. The IRS certificates of assessment, Exhibits 140, 141 and 142 to the Defendant's summary judgment motion, show that the assessments were "jeopardy assessments." Attached as Exhibit 28 are the first notices I received from the IRS concerning the assessment of the trust fund penalties. I never received any notice that the assessments were "jeopardy assessments" or any statement showing the basis of the jeopardy assessment.

54. I have reviewed the Defendant's statement of uncontroverted facts and conclusions of law. The following facts contained therein are not accurate, complete and correct:

Para. No.	Response
7	Admit. However, after August 1998, JPI had both common and preferred stock. I never owned more than approximately 15% of the total outstanding stock.
13	Deny. I did not retain ADP. JPI retained ADP
15	Admit. However, the return for the third quarter of 2000 showed that the tax owed for that period had been paid in full. I believed this to be the case and did not learn until spring 2001, more than 6 months after JPI ceased operation, that a tax deposit may have been misapplied by Imperial Bank and not paid to the IRS.
20	Admit. However, this paragraph fails to note that I only signed one general account check and a handful of payroll checks before late February, 2000. All other checks were signed by Andrew Pollet. This was the period during which most of the tax liability accrued.

21, 22 & 23	Deny. The bank signature card signed in March 2000 only lists me as an authorized signatory. However, because Mr. Pollet determined the amount of money that was deposited in the accounts (through July of 2000), no check could be issued unless he approved it. Thus, he still controlled the dispersal of funds. In August, 2000, Meridian wired funds into JPI's general account, but none of those funds could be dispersed without Dennis O'Brien, on behalf of Meridian, approving the disbursement and signing the wire transfer authorization.
27	Admit that ADP terminated its services, but the stated reason was not "Payroll Issues." The letter states why ADP terminated its services.
28	This paragraph is ambiguous. As of August 2000, JPI had unpaid payroll tax from the third and fourth quarters of 1999 and did not have the funds to make payroll.

29 Admit. Again, however, through July, 2000, all checks had to be approved by Mr. Pollet, otherwise funds to cover the checks would not be deposited and made available in the Imperial Bank accounts. In August, the only funds deposited into the accounts were the monies that were wire transferred in from Meridian. These funds could not be disbursed without Meridian's approval.

30 Deny. After August, 1998, Mr. Pollet alone had power over company finances, and he alone decided what was paid, since he was the source of funding for JPI.

31 Deny. While I signed the signature card, Mr. Pollet arranged for the Imperial Bank loans and made the decision to open the Imperial Bank accounts.

32 Deny. John Lopez, Donald Harringan, and Dr. Jeanne Moldenhauer were all hired by JPI in late 1998. They were hired by JPI on my recommendation and with the approval of Mr. Pollet. Mr. Pollet and his law firm were to have drawn up written

	employment contracts but did not do so until late 1999.
33-36	Admit, but only with Mr. Pollet's approval could any of these be authorized. If Mr. Pollet did not approve, funds would not be made available to pay.
37-40	Admit; however, the Bausch & Stroebel and First Albany Corp. agreements were negotiated by Mr. Pollet. I signed as president at Mr. Pollet's direction.
41	Deny. If any employee was fired, it was initiated by the Department Head. I personally can't remember firing anyone. JPI's employees were laid off in August, 2000, because JPI had not made payroll since July and did not have any funds to continue operations.
43	Admit, but as noted above, I only owned about 15% of the stock from August 1998 until July, 2000, after which I owned approximately 8%.
48	Deny. While until July, 2000, I owned the largest block of stock of any individual, the investor group headed and represented by Mr.

	Pollet had the overwhelming majority of stock until Hanna Auon became the largest single shareholder.
49-56	The paragraphs do not accurately reflect the responses in the questionnaire, and ignore the fact that the questionnaire states that Andrew Pollet was the only person with the authority to decide which creditors of JPI were paid.
61	Deny. Since I did not have the authority to determine which creditors to pay, I am not liable for the tax assessment. Further, I did not know that any tax was owed for the third quarter of 2000 until months after JPI ceased operations and had no funds.

I declare under penalties of perjury of the laws of the United States that the foregoing is true and correct.

DATE: August 2, 2007 */s/*

EARL JORDAN

APPENDIX G

FILED AUGUST 6, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JORDAN, Plaintiff	) Case No. SA CV 06-338) VBF(ANx))
v.	) DECLARATION OF) LISA WUTKA IN
UNITED STATES OF AMERICA, Defendant	) SUPPORT OF) PLAINTIFF EARL) JORDAN'S)OPPOSITION TO)DEFENDANT'S MOTION) FOR SUMMARY) JUDGMENT

I, Lisa Wutka, declare and state as follows:

1. I reside in Portola Hills, California. I am currently employed by Jordan Biologics, Inc. I am submitting this declaration in support of Plaintiff Earl Jordan's opposition to Defendant United States of America's motion for summary judgment.

2. The facts set out in this declaration are based on my personal knowledge. I could and would be able to testify to them if called upon to do so.

3. I was employed by Jordan Pharmaceuticals, Inc. ("JPI"), from September, 1992, until December, 1999. From September, 1992, until March, 1999, I was the accounting manager for JPI.

4. In late 1998, JPI purchased an injectable drug manufacturing facility in Elk Grove Village, Illinois. Andrew Pollet was JPI's attorney, who negotiated the purchase of the facility and raised funds for JPI. In March, 1999, I began working at JPI's Elk Grove Village facility. At that time, I became controller of JPI.

5. In 1999, JPI maintained a general account and a payroll account at Wells Fargo Bank. Mr. Jordan and I were signatories on both of these accounts. Because he was responsible for raising funds for JPI, throughout 1999, Mr. Pollet was the sole person in control of JPI's finances.

6. As of March, 1999, all of JPI's employees, offices and facilities were in Illinois. Its bank accounts, however, were in California. All deposits into JPI accounts after March, 1999, from funds raised by Mr. Pollet were handled by Mr. Pollet and his office. Most of the money going in to the accounts were from funds raised by Mr. Pollet.

7. Prior to November, 1999, I would prepare checks on JPI's accounts at Wells Fargo Bank to pay bills owed by JPI. Mr. Jordan or I would sign the checks. I would then send the checks, together with invoices, purchase orders, and other backup

documentation to Andrew Pollet at his office in Los Angeles for approval. I would also send the payroll checks and payroll information to Mr. Pollet's office. After Mr. Pollet reviewed the checks, his office would send the checks back.

8. If Mr. Pollet did not want a check issued, he would place a post-it note on the check with instructions. If Mr. Pollet authorized a check to be released, I would send it to the creditor to whom the money was owed. Mona Buchanan, who was Mr. Pollet's assistant, would advise me whether their office deposited sufficient funds in the accounts to cover the checks that Mr. Pollet had authorized. Once I was informed that there were sufficient funds in the accounts, I would issue the checks. Nevertheless, on several occasions, checks that I sent out bounced because, in fact, the amount deposited was insufficient to cover all the checks Mr. Pollet authorized.

9. The requirement that all checks with back up documentation be sent by Federal Express to Andrew Pollet to await his approval caused tremendous pressures and delays in paying bills. This resulted in issues with many of JPI's vendors and suppliers. Despite this, I was not allowed to deviate from this practice in accordance with Mr. Pollet's express instructions, because Mr. Pollet was the source of funding for JPI.

10. During the summer of 1999, I would make the payroll tax deposits with the Internal Revenue

Service on behalf of JPI using the Electronic Federal Tax Payment System ("EFTPS").

11. The payroll tax deposits would normally be made on or before the due date. The deposit amount would be the amount computed as due on JPI's payroll for that pay period. Attached hereto as Exhibit 1 is a true and correct copy of EFTS worksheets for JPI for deposits made between July 20 and August 24, 1999. The handwriting on these worksheets is mine.

12. Until sometime in August, 1999, JPI had approximately 50 employees. At that time, it began to hire additional employees in order for the plant to be validated by the FDA to manufacture injectable drugs. By the time I left JPI in December, 1999, it had over 100 employees.

13. Beginning sometime in the third quarter, 1999, Mr. Pollet would only provide sufficient funds to pay net payroll and would not authorize the payment of payroll taxes. This was the first time that I had worked for JPI where the company failed to meet its payroll tax obligation. I was told by Mr. Pollet that since the payroll tax was already past due there was a penalty, and it did not make sense to pay the tax at that time. He further told me that JPI would only be paying vendors, suppliers and net payroll for now, but that the payroll tax would all be paid when additional funding came in.

14. Because Mr. Pollet was only providing enough funds to pay net payroll, and not payroll tax, I

would therefore fax to Ms. Buchanan the payroll register and advise her of the amount that needed to be deposited in the account to cover the net payroll. Attached as Exhibit 2 is a true and correct copy of a fax dated November 30, 1999, to Ms. Buchanan asking that she deposit sufficient funds into JPI's Wells Fargo Bank payroll account to cover the net payroll. Attached as Exhibit 3 is a true and correct copy of a November 30, 1999, letter from Pollet Law to Imperial Bank authorizing the transfer of funds from JPI's general account at Imperial Bank to its payroll account at Wells Fargo Bank.

15. In early November, 1999, JPI opened a general checking and a payroll checking account at Imperial Bank in City of Commerce, California. Mr. Pollet was the signatory on both of these accounts. At this time, Mr. Jordan told me that there would be a change of procedures. Mr. Pollet would be signing checks on the accounts at Imperial Bank. I was to send all invoices and backup documentation by Federal Express to Mr. Pollet, together with the checks for him to sign. After he reviewed and signed the checks, they would be sent back to JPI by Federal Express for me to send out.

16. I never saw the temporary checkbook for JPI's Imperial Bank accounts, because these were always kept by Mr. Pollet. Since I was kept in the dark as to what checks were written on this account, I had to ask Ms. Buchanan for copies of all deposit items and withdrawals from the account. I also had to ask for the starting and ending numbers on all checks

manually written by Mr. Pollet so that JPI could properly account for the funds. This is reflected in the November 30, 1999, fax that is attached as Exhibit 2.

17. I am familiar with Mr. Pollet's signature and handwriting. I have reviewed the bank statements and cancelled checks on the JPI general account at Imperial Bank for the months November, 1999, through February, 2000. True and correct copies of the bank statements and checks on this account for November, 1999, through February, 2000, are attached as Exhibits 4 through 7.

18. All of the checks drawn on the temporary checkbook, checks #1001 through #1029, were written and signed by Mr, Pollet. With one exception, all of the printed checks on the account from #5006 through #5615, were signed by Mr. Pollet. That exception is check #5052, which was signed by Mr. Jordan.

19. Among the checks signed by Mr. Pollet on the temporary checkbook were five checks made payable to himself or to his law firm. These checks are listed below:

Check No.	Check Amount
1002	$ 300,000.00
1003	522,922.19
1027	400,000.00
1028	54,694.42
1029	41,871.97
Total	$1,319,488.00

Of these five checks, numbers 1002 and 1003 were made payable to Mr. Pollet personally.

20. Thus, while JPI was accruing a large payroll tax liability, Mr. Pollet was using his power as the person in control of corporate finances to pay his firm more than $1.3 million. At the same time, he would frequently question small bills, such as JPI's payment for cell phones for key employees or its having an "800" number.

21. Both Mr. Jordan and Mr. Pollet had the ability to sign on JPI's payroll account at Imperial Bank. Mr. Pollet, however, still required that he approve all of these checks and amounts. Through February, 2000, Mr. Pollet signed most of the checks drawn on the payroll account. True and correct copies of the bank statements and cancelled checks on the Imperial Bank payroll account for December, 1999, through March, 2000, are attached as Exhibits 8 through 11.

22. Besides being the only person who could authorize and approve the issuance of JPI checks, Mr. Pollet was the only person who could authorize a wire transfer of funds from the JPI accounts at Imperial Bank. Mr. Pollet would coordinate wire transfers from these accounts with Joe Lim, an officer at the bank. Mr. Jordan did not have independent authority to initiate a wire transfer. All requests for a wire transfer had to be sent to Mr. Pollet or Ms. Buchanan.

23. I do not recall whether I told Mr. Jordan about the fact that payroll taxes were not paid by JPI. Regardless of whether I told him, he did not have the authority to cause a check to be issued to the IRS for past due taxes. The only person who had the authority to do so was Mr. Pollet, who was the source of all funds for JPI.

I declare under penalties of perjury of the laws of the United States that the foregoing is true and correct.

DATE: August 2, 2007

/s/
LISA WUTKA.

Supreme Court, U.S.
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(2)

No. 09-1484

In the Supreme Court of the United States

EARL JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
JOHN A. DICICCO
Acting Assistant Attorney General
KENNETH L. GREENE
CHRISTINE D. MASON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was a person responsible for paying over trust fund taxes withheld from the wages of company employees.

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In the Supreme Court of the United States

No. 09-1484

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 359 Fed. Appx. 881. The orders and opinion of the district court (Pet. App. 5a-6a, 7a-11a, 12a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. A petition for rehearing was denied on March 5, 2010 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on June 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employers are required to withhold Federal Insurance Contribution Act and federal income taxes from

their employees' wages and to remit to the United States the amounts withheld. 26 U.S.C. 3102(a), 3402(a). The withheld taxes constitute a special fund held in trust for the United States. 26 U.S.C. 7501(a); see *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). If an employer withholds trust fund taxes but fails to pay them over to the government, the government may collect the amount of unpaid tax from a "responsible person"—that is, "[a]ny person required to collect, truthfully account for, and pay over any tax"—who "willfully fails" to make the required payments. 26 U.S.C. 6672(a); see *Slodov*, 436 U.S. at 244-246 & n.7. The term "person," for purposes of Section 6672(a), "includes an officer or employee" who "is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 6671(b).

2. In 1989, petitioner founded Jordan Pharmaceuticals, Inc. (JPI), a pharmaceutical company that produced generic injectable drugs. Pet. App. 2a, 13a, 19a-20a. From 1989 until September 6, 2000, petitioner served as JPI's President, Chief Executive Officer (CEO), Treasurer, and Chairman of the Board of Directors. *Id.* at 13a, 19a. He was also a substantial stockholder. *Id.* at 29a. Under JPI's bylaws, petitioner had "general supervision, direction, and control over the corporation's business and its officers." *Id.* at 23a (internal quotation marks and citation omitted).

In 1998, JPI turned to its longtime attorney, Andrew Pollet, to raise capital to fund the purchase of manufacturing facilities. Pet. App. 20a. Petitioner asserts that Pollet demanded control of the company's finances in return for Pollet's performance of fundraising activities. *Ibid.* In 2000, facing financial difficulty, JPI ceased operation and entered into a merger agreement with another company. *Ibid.*

3. JPI did not pay over to the United States its trust fund taxes for the third and fourth quarters of 1999, or for the third quarter of 2000. Pet. App. 20a. The Internal Revenue Service (IRS) conducted an investigation. *Id.* at 23a. During that investigation, petitioner admitted that, during the relevant periods, he had possessed the power (1) to hire and fire employees; (2) to open and close bank accounts; (3) to authorize payroll checks and prepare federal payroll tax returns; (4) to authorize payment of federal tax deposits; and (5) to perform other company-related duties. *Id.* at 24a.

Pursuant to 26 U.S.C. 6672, the IRS assessed trust fund recovery penalties against petitioner. After making partial payments toward the assessed penalties, petitioner filed an administrative refund claim. See Pet. App. 13a n.1. The IRS denied petitioner's request for refund. See *ibid.*

4. Petitioner filed a refund suit in federal district court, and the United States counterclaimed for the balance of the assessments. Pet. App. 13a n.1. The district court awarded summary judgment in favor of the United States with respect to the third and fourth quarters of 1999. *Id.* at 5a-35a.[1]

The district court concluded that petitioner was liable for the payment of the trust fund taxes under 26 U.S.C. 6672(a) because he was a "responsible person" who had "willfully" failed to pay the taxes. Pet. App. 13a; see *id.* at 21a-31a. The court explained that "whether a person is 'responsible' is a question of 'status, duty, and authority,'" *id.* at 16a (quoting *Davis* v. *United*

[1] Petitioner's liability for trust fund taxes for the third quarter of 2000 was settled by the parties while the case was pending before the district court. Cf. Pet. App. 5a 6a (granting summary judgment order only with respect to the third and fourth quarters of 1999).

States, 961 F.2d 867, 873 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993)), and that a person is "responsible" for payment of trust fund taxes if he has "significant control" over "what bills should or should not be paid, and when," *ibid.* (quoting *Purcell* v. *United States*, 1 F.3d 932, 936 (9th Cir. 1993)). Because "*exclusive* control is not required," the court noted, "more than one person within a company may be held to be a 'responsible' person." *Ibid.* (citing *Gephart* v. *United States*, 818 F.2d 469, 476 (6th Cir. 1987)). The court further explained:

> Among the factors that courts have looked to determine whether a person exercises sufficient authority to be 'responsible' are (1) The duties of the officer under the corporate bylaws; (2) The ability of the officer to sign checks of the corporation; (3) The identity of the officers, directors and shareholders of the company; (4) The identity of the person responsible for the hiring and firing of employees; and (5) The identity of the person who controlled the finances of the corporation.

Id. at 23a (citing *Gephart*, *supra*).

Applying that multi-factor analysis to the circumstances of this case, the district court concluded that petitioner was responsible for the payment of trust fund taxes during the relevant time periods. The court explained that petitioner was JPI's President, CEO, Treasurer, and Chairman of the Board of Directors, Pet. App. 23a; that, under the corporate bylaws, he had "general supervision, direction, and control over the corporation's business and its officers," *ibid.* (internal quotation marks and citation omitted); that he was a signatory on two bank accounts at Wells Fargo Bank and had

signed payroll checks and at least one check on the general account after payroll and general accounts were opened at Imperial Bank in November 1999, *id.* at 25a-26a; that he had hired employees, including "individuals responsible for the financial administration of the company," *id.* at 28a; that he was "responsible for large-scale purchases," *ibid.*; and that he was a "substantial stockholder," *id.* at 29a.

The district court rejected petitioner's argument that he could not be a "responsible" person for these purposes because he had yielded control of JPI's finances to Pollet in exchange for Pollet's agreement to raise funds for JPI. Pet. App. 26a-27a, 30a. The court explained that "more than one person may be 'responsible' for purposes of 26 U.S.C. section 6672," and that whatever control Pollett had exercised over the company's finances "d[id] not relieve [petitioner], in his role as President, CEO and Treasurer of the company, from his duty to guarantee that trust fund taxes are paid." *Id.* at 30a. The court also noted that, in addition to his titles, petitioner had "*authorized* Pollet as a signatory" on the company's bank accounts, and had "indisputably exercised other indicia of authority." *Id.* at 26a-27a.

Petitioner did not dispute that his failure to pay trust fund taxes for the third and fourth quarters of 1999 was willful. See Pet. App. 32a-33a (noting that "[o]ther creditors were paid * * * in an apparent attempt to keep JPI running," even though petitioner knew that JPI's trust fund taxes remained unpaid). The district court held petitioner liable in the amount of $404,413.65, plus any additional interest accruing after November 5, 2007. *Id.* at 6a.

5. The court of appeals affirmed. Pet. App. 1a-4a. In an unpublished per curiam opinion, the court con-

cluded that there was "no factual dispute regarding [petitioner's] status as a 'responsible person' under § 6672," despite Pollet's alleged control over the company's finances. *Id.* at 2a-3a. The court explained that petitioner was the "founder, President, Director, CEO, and Treasurer," and that he had "authorized much of Pollet's financial control and, by his own admission, managed the day-to-day operations of business, prepared the payroll tax returns, authorized payments of federal tax deposits, signed financing contracts, and determined the company's financial policy." *Id.* at 2a.

ARGUMENT

Petitioner contends (Pet. 14-37) that the district court erred in concluding that he was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672. The court of appeals correctly rejected that contention, and its factbound determination does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As the courts below correctly recognized, an officer or employee is a "responsible person" under Section 6672 if the individual's "status, duty, and authority" are such that he has the effective ability to pay the taxes owed. Pet. App. 3a (quoting *Davis* v. *United States*, 961 F.2d 867, 873 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993)); see *id.* at 23a; see also *Purcell* v. *United States*, 1 F.3d 932, 937 (9th Cir. 1993) ("[T]he duty to ensure that withheld employment taxes are paid over flows from the authority that enables one to do so."). For purposes of liability under 26 U.S.C. 6672, a person is "responsible" if he has "significant" control over the com-

pany's financial affairs; total or exclusive control is not required. Pet. App. 23a (quoting *Purcell*, 1 F.3d at 937).

The courts below correctly held that petitioner was a "responsible person" under the applicable standard. Petitioner was JPI's founder, President, CEO, Treasurer, and Chairman of the Board of Directors. Pet. App. 23a. Under the corporate bylaws, he had "general supervision, direction, and control" of the company. *Ibid.* (internal quotation marks and citation omitted). Petitioner admitted that he had the "authority to hire and fire employees, to open and close corporate bank accounts, to authorize payroll checks and prepare federal payroll tax returns, to [pay] federal tax deposits, and other duties." *Id.* at 24a. Petitioner had signed checks during the relevant period, *id.* at 26a, and he was a "substantial stockholder" of the company, *id.* at 29a.

The courts below further correctly concluded that any financial authority petitioner may have yielded to Andrew Pollet did not relieve petitioner of his responsibility for JPI's unpaid trust fund taxes. The court of appeals based that holding both on the scope of petitioner's overall authority over the affairs of the corporation and on the fact that petitioner had "authorized much of Pollet's financial control." Pet. App. 2a; see *id.* at 2a-3a; see also *Purcell*, 1 F.3d at 937 (explaining that a responsible person cannot avoid liability by delegating his authority to other persons). That factbound conclusion does not warrant further review.

2. Petitioner contends (Pet. 15-30) that the decision below conflicts with decisions of other courts of appeals and with a prior decision of the Ninth Circuit. That contention lacks merit.

Contrary to petitioner's suggestion (Pet. 15-16), the decision below does not conflict with either *United*

States v. *Carrigan*, 31 F.3d 130 (3d Cir. 1994), or *Lewis* v. *United States*, 336 Fed. Appx. 535 (6th Cir. 2009) (unpublished), cert. denied, 130 S. Ct. 1713 (2010). In each of those cases, the court of appeals determined responsible-person status by applying the same general multi-factor analysis as the courts below. See *Carrigan*, 31 F.3d at 133; *Lewis*, 336 Fed. Appx. at 538-539. To be sure, the courts of appeals in *Lewis* and *Carrigan*, unlike the court below, found that disputed factual issues precluded summary judgment. That difference in outcomes, however, resulted from factual dissimilarities between those cases and this one, rather than from any inconsistency among the courts' legal approaches. See *Carrigan*, 31 F.3d at 134 (corporate president presented evidence that he did not own stock in company, did not sign company's tax returns, did not negotiate with company creditors, lacked independent authority to hire or fire employees, and lacked access to the corporate books, records, and checkbooks); *Lewis*, 336 Fed. Appx. at 538-539 (corporation's CEO presented evidence permitting an inference that the Board of Directors, which had assigned financial duties to the Chief Financial Officer (CFO), "would not have supported [the taxpayer] had he attempted to override [the CFO's] decisions about which creditors to pay," while the CFO presented evidence that the Board of Directors had transferred responsibility for deciding "what was paid and what wasn't paid" to another person).[2]

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[2] Other court of appeals decisions cited in the petition for a writ of certiorari (at 16-17) similarly applied the same general approach as the courts below to factual circumstances that are distinguishable from this case. See *Vinick* v. *United States*, 205 F.3d 1, 11-15 (1st Cir. 2000) (concluding that the district court's findings did not establish that the corporate treasurer was a responsible person where he lacked access to

Petitioner's reliance (Pet. 23-24, 27, 29-30, 35-36) on *Alsheskie* v. *United States*, 31 F.3d 837 (9th Cir. 1994), is likewise misplaced. Even if the courts below had applied a standard different from that applied in *Alsheskie*, an intracircuit conflict would not provide a basis for this Court's review. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, no such conflict exists.

The court in *Alsheskie* explained that, for purposes of liability under 26 U.S.C. 6672, a "responsible party" is a person who has "the authority required to exercise significant control over the corporation's financial affairs." 31 F.3d at 838 (quoting *Purcell*, 1 F.3d at 937). Applying that standard, the Ninth Circuit upheld, as not clearly erroneous, the district court's finding that Alsheskie was not responsible for his company's unpaid trust fund taxes even though he was the titular head of the corporation. The court explained that Alsheskie's control "over what bills to pay or not pay" rested with the corporation's parent pursuant to a financing agreement, and that he was "an employee, not an owner during the critical period." *Id.* at 839. As the Tenth Circuit later noted, "[a]ny lack of control which [the taxpayer in *Alsheskie*] may have had resulted from an arrangement which he did not create." *Bradshaw* v. *United States*, 83

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the company checkbooks during the relevant period, never exercised his hiring authority, and "had little involvement in the daily management of the corporation"); *O'Connor* v. *United States*, 956 F.2d 48, 51-52 (4th Cir. 1992) (concluding that allegations of company vice president, part-owner, and director that he did not perform any duties associated with his titles, but rather acted as "little more than a passive investor," were sufficient to create a factual question about his responsibility for the payment of trust fund taxes).

F.3d 1175, 1181 n.6 (1995), cert. denied, 519 U.S. 928 (1996). In this case, by contrast, the court of appeals explained that petitioner had not simply acted as an employee, and the court viewed the record as establishing that petitioner himself had "authorized much of Pollet's financial control." Pet. App. 2a.

Petitioner disputes that assessment of the evidence, suggesting that Pollet "wrested control of the company's finances from petitioner." Pet. 27; see Pet. 27-29. Petitioner's own recitation of the facts (see Pet. 9, 28-29), however, leaves little doubt about his involvement in creating the financial arrangement with Pollet. In any event, that factbound dispute does not implicate any legal issue of recurring importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
JOHN A. DICICCO
Acting Assistant Attorney General
KENNETH L. GREENE
CHRISTINE D. MASON
Attorneys

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EARL JORDAN,

Petitioner

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UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

A. LAVAR TAYLOR
Counsel of Record
ROBERT S. HORWITZ
Law Offices of A. Lavar Taylor
6 Hutton Centre, Suite 880
Santa Ana, CA 92707
(714) 546-0445
ltaylor@taylorlaw.com

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

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26 U.S.C.§6672 . . . . . *passim*

Petitioner Earl Jordan submits this reply to the Brief for the United States in Opposition.

The Brief for the United States in Opposition ("Brief") is most notable for its reluctance to acknowledge that the present case involves an appeal from the granting of a motion for summary judgment in favor of the United States, on behalf of the Internal Revenue Service. Much of the Respondent's Brief reads as if the present case involved an appeal from a trial in which the trial court, after weighing conflicting evidence, found that Petitioner was a "responsible person." Thus, at page 4, the Brief notes that the district court discussed the various non-exclusive factors used by the Ninth Circuit to determine whether a person is a "responsible person" for purposes of 26 U.S.C. §6672. The Brief then states that the district court, "[a]pplying that multi-factor analysis to the circumstances of this case," concluded that Petitioner was a responsible person. Brief at pp. 4-5. While Respondent may want this Court to believe that there was a trial after which the district court concluded that Petitioner was a "responsible person," this is not what happened.

The district court in the present case granted the summary judgment motion filed by the Respondent over the opposition of Petitioner. Under this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which the Respondent fails to cite or discuss anywhere in its Brief, the district court was required to view in the light most favorable to Petitioner the evidence offered by Petitioner on the

issue of whether Petitioner was a "responsible person." The district court could properly grant the Respondent's summary judgment motion only if Petitioner's evidence was insufficient as a matter of law to raise a genuine issue of material fact on the question of whether Petitioner was a "responsible person."

Thus, if the evidence offered by Petitioner in opposition to the United States' summary judgment motion was sufficient to create a triable issue of fact on the question of whether Petitioner had the power and authority to pay the taxes in question, *see O'Connor v. United States*, 956 F.2d 48 (4th Cir. 1992), the granting of summary judgment in favor of the United States was improper. *Id.*

The evidence offered by Petitioner in opposition to the summary judgment motion filed by the United States included testimony and documents which showed the following:

> – During the quarters in which the unpaid employment taxes accrued (the third and fourth quarters of 1999) and subsequently, the bank account maintained by the company were located in California, where Andrew Pollett was located, not in Illinois where the business and the Petitioner were located. Declaration of Earl Jordan ("Jordan Decla.") at ¶¶ 26, 27, App. at p. 47a; Declaration of Lisa Wutka ("Wutka Decla.") at ¶¶6, 15, App. at pp. 63a, 66a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett raised from investors nearly all of the funds deposited into the company's bank account. Jordan Decla. ¶¶ 17, 19 – 20, 27, 29, 44, 45, App. at pp. 42a – 44a, 47a, 48a, 54a; Wutka Decla. ¶¶ 4 – 6, App. at p. 63a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett determined the amounts that would be deposited into the company's bank account. Jordan Decla. ¶ 27, App. at p. 47a; Wutka Decla. ¶¶ 8, 13 – 14; App. at pp. 64a, 65a – 66a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett exclusively controlled the finances of the company. Jordan Decla. ¶20, App. at pp. 43a – 44a; Wutka Decla. ¶¶5, 23, App. at p. 63a, 69a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett alone arranged for financing for the corporation. Jordan Decla. ¶¶ 20, 44, 45, App. at pp. 43a – 44a, 54a; Wutka Decla. ¶5, App. at p. 63a.

– From the summer of 1998 until the third quarter of 2000, Andrew Pollett had exclusive authority to decide which bills of the company to pay. Jordan Decla. ¶¶ 20, 37, 38, App. at pp. 43a – 44a, 51a – 52a; Wutka Decla. ¶¶ 5 – 9, 15, 16, 22, 23, App. at 63a – 64a, 66a, 68a – 69a.

– As of the beginning of the third quarter of 1999, Mr. Jordan did not own more than 15% of the company's outstanding stock. During all times relevant, Mr. Pollett's investor group held most of the remaining stock and Mr. Pollett controlled the company's Board of Directors. Jordan Decla. ¶¶ 18, 21, App. at 43a, 44a.

– Prior to November of 1999, all checks written on the company's checking account were physically sent from the company's premises in Illinois to Mr. Pollett in California for approval. Checks which were approved by Mr. Pollett were sent back to Illinois but were not sent out until Mr. Pollett's assistant advised the company's controller that sufficient funds had been deposited to the company's bank account to cover the checks. Jordan Decla. ¶20, App. at pp. 43a – 44a; Wutka Decla. ¶¶ 7 – 9, App. at pp. 63a – 64a.

– In November of 1999, when Petitioner first learned about the existence of the unpaid employment tax liabilities, Pollett established a new corporate bank account at Imperial Bank in California. Pollett had exclusive control over the check book for this account. Pollett also had exclusive authority to make wire transfers out of this account. Jordan Decla. ¶¶ 27, 31, App. at pp. 47a, 49a, 51a; Wutka Decla. ¶¶ 15 – 16, 22, App. at pp. 66a – 67a, 68a.

– Starting in the third quarter of 1999, Andrew Pollett would only provide sufficient funds to pay the "net payroll" of the company, *i.e.*, he did not provide sufficient funds to pay the company's payroll taxes. Pollett advised the company controller that the company would only be paying vendors, suppliers and net payroll for the time being, but that the payroll taxes would be paid when additional funding came in. Prior to this date, the company had always paid its payroll taxes on a timely basis. Wutka Decla. ¶ 13, App. at p. 65a.

– While the company was accruing a large employment tax liability, Mr. Pollett caused over $1.3 million to be paid to himself and his law firm from the Imperial Bank account. Jordan Decla. ¶¶ 34, 35, App. at p. 50a; Wutka Decla. ¶¶ 19, 20, App. at pp. 67a – 68a.

Essentially, the district court held that the facts set forth above, which it was required to accept as true for purpose of ruling on the summary judgment motion, *see Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249 – 255 , were insufficient to create a genuine issue of material fact on the question of whether Petitioner had the ability to control the funds of the company during the relevant time period. The Ninth Circuit concurred with the district court's ruling.

The Respondent's Brief, when describing the ruling of the Ninth Circuit, ignores the fact that Ninth Circuit was required to determine whether, as a

matter of law, the evidence offered by Petitioner in response to the government's summary judgment motion was sufficient to create a genuine issue of material fact on the question of whether Petitioner was a "responsible person." Thus, the Brief incorrectly describes the ruling of the Ninth Circuit as a "factbound conclusion." Brief at p. 7. That is an obvious mischaracterization of the Ninth Circuit's holding. The Ninth Circuit, like the district court, essentially held that the evidence submitted by Petitioner in response to the government's summary judgment motion was insufficient as a matter of law to raise a genuine issue of material fact on the question of whether Petitioner was a "responsible person" for purposes of 26 U.S.C. §6672.

The fact that the district court and the Ninth Circuit did not follow this Court's teachings in *Anderson v. Liberty Lobby, Inc.*, *supra*, and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), namely, that summary judgment should not be granted if there is a genuine issue as to any material fact, is highlighted by the statement in the Brief that "Petitioner disputes that [*i.e.*, the Ninth Circuit's] assessment of the evidence...." Brief at p. 10. Neither the district court nor the Ninth Circuit were supposed to weigh the evidence in the context of a summary judgment motion. Their sole function was to determine whether there was "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249. Both courts below failed to fulfill their function.

The Brief's failure to acknowledge that the legal standard set forth in *Anderson v. Liberty Lobby, Inc.*, *supra*, is the test that should have been applied by the courts below highlights the weakness of the government's position in opposing Petitioner's request for a writ of certiorari.

The Brief at pp.7–8 incorrectly claims that there is no split among the courts of appeal on the question of when, as a matter of law, a party has presented sufficient evidence to raise a genuine issue of material fact about whether a person is a "responsible person" for purposes of 26 U.S.C. §6672. The Petition for Certiorari explains the split in the Circuit Courts of Appeal on this issue in great detail at pp. 14 – 36.

Recognizing a split in the circuits, the Tenth Circuit, in *Bradshaw v. United States*, 83 F.3d 1175, 1178 (10th Cir. 1995), *cert. denied* 519 U.S. 928 (1996), quoted from Judge Trott's dissent in *Alsheskie v. United States*, 31 F.3d 837 (9th Cir. 1994), in which Judge Trott stated that the majority opinion in *Alsheskie* "run[s] counter to the ... law of this and other circuits." The Tenth Circuit then stated:

> We believe the dissent in *Alsheskie* is the more persuasive view.

83 F.3d at 1181-82.

Clearly, there is a conflict in the Circuit Courts of Appeal. The present case squarely presents this

Court with an opportunity to resolve this conflict on the question of what evidence is required to raise a genuine issue of material fact on the issue of whether an individual is a responsible person for purposes of 26 U.S.C. §6672. The failure of Respondent's Brief to discuss in any meaningful fashion the real issue presented in this case, *i.e.*, whether Petitioner offered sufficient evidence to create a triable issue of fact on the issue of whether he was a "responsible person" for purposes of 26 U.S.C. §6672, is most telling. The petition for writ of certiorari should be granted.

Respectfully submitted,

A. LAVAR TAYLOR
Counsel of Record
ROBERT S. HORWITZ
Law Offices of A. Lavar Taylor
6 Hutton Centre, Suite 880
Santa Ana, CA 92707
(714) 546-0445
ltaylor@taylorlaw.com

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